88-1737

APR 24 1989

JOSEPH F. SPANIOL, JR.
CLERK

Case No._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

ELMER R. BARBEE

PETITIONER

VS

THE UNITED STATES

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL COURT

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5 cy pd

Questions Presented

A. When the Inspector General of the Army, the appropriate authority, as per Fausto, states that an unwarranted personnel action has been taken, and that the head of the agency has violated procedural regulations, does 32 USC 709(e)(5) bar a suit for back pay?

B. Does the current interpretation by the lower courts of 32 USC 709 (e)(5) allowing no appeal, administrative or judicial, beyond the adjutant general, conflict with Technician Personnel Regulation 752 page 13, paragraph 2-19, C,(2), which identifies this appeal to be admininstrative?

C. Does the inclusion in 32 USC 709(f) of 5 USC 2108, the definition of a veteran, disabled veteran and a preference eligible, strip an honorably discharged veteran of all the rights and benefits given to him by Congress during a period of employment as a National Guard Technician?

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CASES

United States vs. Fausto

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STATUTES

Technician Personnel Act, 32 USC 709

10 USC 3039

10 USC 3040

SECRETARIAL REGULATIONS

INSPECTOR GENERAL ACTIVITIES AND PROCEDURES

AR 20-1, June 15, 1978, Paragraph 1-12, 3-3e, and 3-13 TECHNICIAN PERSONNEL REGULATION,

DISCIPLINE AND ADVERSE ACTION TPR 752.23 February 1987, Paragraph 2-19 C (2)

OTHER SOURCES

ARTICLE I Section 8 of the Constitution

ARTICLE III Section 2 of the Constitution

TENTH AMENDMENT of the Constitution

Complaint for Disciplinary Action by Office

of the Special Counsel

Department of the Army, Office of the Inspector General

Letter dated 7 March 1989

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL COURT

Petitioner, Elmer R. Barbee, respectfully pray that a Writ of Certiorari issue to review the judgement and opinion of the United States Court of Appeals for the Federal Circuit entered in the above-entitled cause on January 27, 1989.

I.

OPINIONS BELOW

The opinions of the United States Claims Court, and the United States Court of Appeals for the Federal Circuit are Appendixes A and B respectively. The Office of the Special Counsel, Complaint for Disciplinary Action against Major Leslie T. Everett is Appendix C. The findings of the Department of the Army, Office of the Inspector General, is Appendix D.

II.

JURISDICTION

The opinion of the United States Court of Appeals for the Federal Circuit was decided on January 27, 1989, and this petition was filed within 90 days of that date. The jurisdiction of this court is invoked pursuant to 28 USC 1254(1).

III.

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 8 of the United States Constitution provides:

> "To provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress."

(Emphasis added to pertinent section)

Article III. Section 2 of the United States Constitution provides:

> "The judicial power shall extend to all cases, in law and equity, arising under the Constitution, the laws of the United States, and treaties made, or which shall be made, under their

authority: - to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; - to all controversies between two or more states, between a state and citizens at another state; - between citizens of differenct states; - between citizens of the same statee or the citizens thereof, and foreign states, citizens or subjects."

(Emphasis added to pertinent section)

The Tenth Amendment of the United States Constitution provides:

"The powers not delegated to the United States by the Constitution, not prohibited by it to the states. are reserved to the states respectively, or to the people."

(Emphasis added to pertinent section)

SECRETARIAL REGULATION INVOLVED

The INSPECTOR GENERAL ACTIVITIES AND PROCEDURES, Army Regulation 20-1 paragraph 1-12 provides:

"In elimination actions under AR 635-100 or AR-635-200 or other adverse personnel action, such as a derogatory OER requiring referral to the rated officer, relief from duties, official reprimand, where there are no other sufficient records, a commander or head of an agency proposing to use an Inspector General record in support of such

action will identify that portion of the record which the commander or agency head proposed be used by the elimination board or by the command in other adverse personnel actions, and will coordinate with the office of the Inspector General prior to initiation of action."

(Emphasis added to pertinent section)

The INSPECTOR GENERAL ACTIVITIES AND PROCEDURES, Army Regulation 20-1 paragraph 3-3e provides:

"Any type of disciplinary or other adverse action against an individual for registering a complaint, except as provided for in paragraph 3-4, is prohibited."

The INSPECTOR GENERAL ACTIVITIES AND PROCEDURES, Army Regulation 2-1 paragraph 3-13 provides:

"Prohibitions. Department of the Army personnel are prohibited from restricting in any manner any individual form registering a complaint or cooperating with an Inspector General. Moreover, once an individual has submitted a complaint or cooperated with an Inspector General, Department of the Army personnel are prohibited from initiating any type of disciplinary, adverse or other action against that individual solely because of the complaint or cooperation rendered the Inspector General. The only exception is described in paragraph 3-4."

(Emphasis added to pertinent section)

TECHNICIAN PEPSONNEL REGULATION 752, DISCIPLINARY AND ADVERSE ACTION, paragraph 2-19, c, (2) provides:

> "....that in accordance with 32 USC 709e (5) there is no further administrative review of the State Adjutant General's final decision."

(Emphasis added to pertinent section)

STATEMENT OF FACTS

In October 1979, Major Elmer R. Barbee, a veteran and a GS-12, North Carolina Army National Guard Civil Service Technician registered complaints with the Inspector General under Army Regulation 20-1, dated June 15, 1978. Those complaints registered were against Major Leslie T. Everett, (Barbee's first level supervisor) and LTC Bruce C. Guard, (Barbee's second level supervisor). As a result of Barbee's complaints to the Inspector General, LTC Guard received a one week's suspension.

On February 22, 1980, Major Everett proposed Barbee's removal from his civil service position for making false statements during the Inspector General Investigation. Barbee submitted a reply stating that he made no false statements to the Inspector General and that the proposed removal action was a violation of Inspector General regulation AR 20-1. Barbee was removed from employment on April 11, 1980.

A Civil Service Hearing was conducted and still no false statments were presented. The Agency stated only that the comlaints rendered were unsubstantiated, and therefore false. The Civil Service Hearing Officer sustained the removal action. On November 6, 1980, the North Carolina National Guard, Adjutant General, MG William E. Ingram, ruled the removal action as appropriate and final.

On June 10, 1982 Barbee complained to the Office of the Special Counsel (OSC) that he was terminated from his National Guard Technician position because he was a whistle blower. The OSC conducted in investigation into Barbee's 1979 Complaints to the Inspector General and filed a Complaint for Disciplinary Action for violation of 5 USC 2302 (b)(9). Reprisal for Exercise of Appeal Rights. The North Carolina Attorney General's Office requested dismissal of the complaint for lack of jurisdiction citing 32 USC 709

(Technician Personnel Act) as reserving the disciplining of National Guard Technicians to the state adjutants general. On June 18, 1985, the MSPB dismissed the action stating that only the State Adjutant General could discipline technicians.

On April 7, 1986, Barbee filed suit against the United States in the United States Claims Court (Case No. 230-86c) for back pay and expenses under the Back Pay Act citing Tucker Act jurisdiction. The United States moved for dismissal upon the basis that The United States Claims Court lacked subject matter jurisdiction to entertain the action bacause Barbee's exclusinve right of appeal was to the Adjutant General of North Carolina pursuant to 32 USC 709 (e)(5). Barbee argued that 32 USC 709 (e)(5) referred to administrative appeal only, citing Technician Personnel Regulation 752, paragraph 2-19, C, (2), not legal suits filed in courts.

At the request of the United States, the United States Claims Court delayed ruling on Barbee's suit for almost one year awaiting the Supreme Court decision on Fausto. The United States Claims Court dismissed Barbee's suit stating that in accordance with United States v. Fausto No. 86-595 decided January 25, 1988, that it lacked the jurisdiction to hear plaintiff's claims.

On July 22, 1988, Barbee filed an appeal with the United States Appeals Court for the Federal Circuit, Case No. 88-1374, using the investigation by the Office of the Special Counsel and Complaint for Disciplinary Action as appropriate authority for a suit for back pay to lie. Barbee also requested the Department of the Army, Office of the Inspector General to rule as to whether Secretarial regulations were violated by the agency in proposing Barbee's removal. The Office of the Inspector General delcined comment

because the question posed was a matter of litigation. The United States argued that Barbee was not a preference eligible (veteran) citing 32 USC 709(f) and that a judication should be denied pursuant to 32 USC 709(e)5.

Barbee argued that 32 USC 709(f) denied veterans only the five point preference upon initial employment and veteran's preference in reduction-in-force procedures as explained in the legislative history of the Act. Congress did not intend to deny an honorably discharged veteran his traditional right to go to court as a result of a Civil Service adverse personnel action. Barbee also argued that to allow a state appointed Adjutant General who has violated Secretarial regulations and procedures to be the final appeal of a federally funded agency violates Article I, Section 8 of the Constitution. Barbee further argued that the court was the appropriate authority to resolve

Constitutional questions and not to allow the court to do so pursuant to 32 USC 709(e)5 would be a violation of not only Article III, Section 2, but also possibility the Tenth Amendment. The Constitutional arguments were not addressed by the lower courts. The United States Court of Appeals for the Federal Court denied Barbee's appeal on January 27, 1989.

On March 7, 1989, the Department of the Army, Office of the Inspector General provided Barbee a letter stating that the North Carolina National Guard had no basis for administering an adverse action against him. The Office of the Inspector General also stated that the proposal of an adverse action was in violation of Secretarial regulation AR 20-1, dated June 15, 1978. Barbee then submitted a motion to the US Court of Appeals for the Federal Circuit to rehear his case on this new evidence stating that now Barbee vs. The United States conforms with the appropriate

authority as defined in The United States vs. Fausto to allow a suit of back pay to lie. The Clerk of the US Court of Appeals for the Federal Circuit rejected Barbee's motion.

V.

REASONS FOR GRANTING THE WRIT

A. THIS CASE PROVIDES THIS COURT WITH AN OPPORTUNITY TO DECLINEATE ON THE BOUNDARIES OF JURISDICTION OF THE ADJUTANT GENERAL, SET FORTH IN 32 USC 709.

The United States Claims Court misstated the facts of the case, in that it failed to acknowledge that the complaint rendered an Inspector General was the basis for Barbee's removal. The United States Claims Court also failed to acknowledge Barbee's exact employment under 32 USC 709. Although Barbee was an excepted service employee, most of provisions of the Civil Service Reform Act of 1978 are not applicable to National Guard Technicians. National Guard Technicians are governed by

regulations prescribed by the Secretary of the Army or the Secretary of the Air Force, as the case may be and those regulations are administered by the state appointed Adjutant General. National Guard Technicians are considered employees of the Department of the Army or the Department of the Air Force and of the United States and, thus are those employees in the service of the United States as provided in Article I, Section 8 of the Constitution. The United States Claims Court cited the United States v. Fausto, 108 S. Ct. 668 (1988) as grounds to dismiss Barbee's suit for back pay.

In Barbee's appeal, The United States Court of appeals for the Federal Circuit held that in United States v. Fausto, 108 S. Ct. 668 (1988), the Civil Service Reform Act repealed any previously existing Tucker Act jurisdiction to entertain suits based on unwarranted removal of all excepted service employees. The Supreme Court went into great detail explaining how the Civil

Service Reform Act applied to employees such as Fausto; however, most of those provisions of the Civil Service Reform Act are substituted by Secretarial Regulations in the employment of National Guard Technicians.

Secretarial regulation, TPR 752 identified the word "appeal" as used in 32 USC 709(e)5 as being an administrative review therefore not barring judicial review of a suit for back pay. This was not addressed in the lower court's decision. The United States Court of Appeals for the Federal Circuit did not address Barbee's argument that Barbee's supervisor nor the Adjutant General could remove Barbee as a reprisal action for "whistle blowing" as found by the Office of the Special Counsel.

The application of Fausto by both lower courts in Barbee's case as a National Guard Technician is expanding the Fausto decision beyond those areas defined by the Supreme Court.

B. THE LETTER DATED MARCH 7, 1988 FROM THE OFFICE OF THE INSPECTOR GENERAL SHOULD SURFICE AS APPROPRIATE AUTHORITY TO ALLOW A SUIT IN THIS CASE FOR BACK PAY TO LIE.

All of those powers granted the State Adjutant General in 32 USC 709 are subject to Secretarial regulations. Army Regulation 20-1, INSPECTOR GENERAL ACTIVITIES AND PROCEDURES is a Secretarial regulation that is binding on the National Guard Technicians and the State Adjutant General. The letter dated March 7, 1989 states that Army Regulation 20-1 for which the Office of the Inspector General is the proponent, should not have been cited as the basis for adverse action against Barbee. It explains that there was no basis for taking disciplinary action, therefore making Barbee's removal an unwarranted personnel action, and prohibited by Secretarial regulations. It further states the agency head or Adjutant General did not follow procedures required

by paragraph 1-12 of Army Regulation 20-1.

Even though this letter was received after the United States Court of Appeals for the Federal Circuit had rendered it's opinion, and a MOTION FOR RECONSIDERATION OF JANUARY 27, 1989 DECISION BASED ON NEW EVIDENCE submitted 17 March 1989, was denied, it is clear that this letter is in accordance with Fausto, and is the "appropriate authority" stating that an unwarranted personnel action did occur. Therefore the suit for back pay should lie.

C. THE INCLUSION OF 5 USC 2108 IN 32 USC 709

(f) WAS INTERPRETED BY THE LOWER COURT AS TO STRIP VETERANS OF ALL RIGHTS BESTOWED BY CONGRESS.

The Technicians Personnel Act 32 USC 709(f)

states:

> "Sections 2108, 3502, 7511, and 7512 of title 5, do not apply to any person employed under this section."

Title 5 USC 2108 defines a veteran, a disabled veteran and a preference eligible, and was substituted in part for the first 76 words of The Veteran's Preference Act of 1944. In order for a soldier to receive any of those benefits granted by Congress to an honorably discharged veteran, he or she must by definition, meet the requirements of 5 USC 2108.

To be eligible for any of those benefits of the Veteran's Administration, (ie. Veteran's Loans, Veteran's Educational Assistance, use of Veteran's hospitals, and burial in a Veteran's cemetery), one must meet the requirments of 5 USC 2108. Barbee was an honorably discharged veteran, having served with distinction in Vietnam from September 1969 to September 1970. The inclusion of 2108 of title 5 in 32 USC 709 (f), as interpreted by the lower court, not only made him a non-preference eligible, but also a non-veteran, stripping him of all benefits and of the traditional rignt

of a veteran to go to court. This is a right that Barbee had earned from having served in combat.

Language has been included in 5 USC 2108, THE VETERAN'S READJUSTED BENEFITS ACT of 1966, and the other statutes granting veterans benefits, that make it clear that no entitlements to veteran's preference arises from service under the provisions of section 511(d) of Title 10, United States Code, pursuant to an enlistment in the Army National Guard or the Air Force National Guard or as a Reserve for service in the Army Reserve, Naval Reserve, Air Force Reserve, Marine Corps Reserve, or Coast Guard Reserve.

Considering that National Guard Caretakers, as National Guardsmen were on extended tours of duty, for training purposes only, with the Army for longer that 180 consecutive days during the Vietnam era, it is understood that legislation had to be clear that they were

not entitled to Veteran status. National Guard Caretakers prior to the 1968 Act were state employees, and so were therefore not entitled to veteran status or veterans preferences. This language was carried over from the old state Caretaker status with the passing of 32 USC 709, the National Guard Technician Act of 1968. In studying the Legislative history in House Report No. 1823 reprinted in 1968 U. S. Code, Congress and Administrative News, it is clear that Congress only intended to deny veterans the five point preference in reduction-in-force procedures. It was not intended that veterans employed as National Guard Technicians be placed in the same class as those who never served their country in time of war. The Fausto decision addressed three classes of Civil Service employees; the competitive, the preference eligible excepted (veteran) and the non-preference eligible excepted (non-veteran). This new interpretation

by the lower court would create a fourth class of employee, that being a on-preference eligible excepted (veteran). This interpretation in effect, places Barbee in the same status as a dishonorably discharged veteran.

D. THE CONSTITUTIONAL PROVISIONS OF THIS CASE COULD BE INTERPRETED AS MANDATING JUDICIAL REVIEW OR REMOVAL ACTIONS TAKEN AGAINST NATIONAL GUARD TECHNICIANS.

Article I, Section 8 of the United States Constitution reserves for governing such part of the militia as may be employed in the service of the United States, to the federal government. National Guard Technicians as of 1968 were employees of the Department of the Army and of the United States and therefore come under this governing provision. A state adjutant general is a state appointed or state elected official and acts as an agent fo the United States when administering to those National Guard Technicians under 32

USC 709. If the state adjutant general violates those Secretarial regulations prescribed, he is outside of his jurisdiction.

Article III, Section 2 of the Constitution gives to the courts the judicial power over all cases in law and equity arising under the Constitution, and the laws of the United States.

In that Congress clearly established in 32 USC 709(e) 3 that National Guard Technicians could only be removed for cause, and Barbee was removed by the Adjutant General in violation of Secretarial regulation, without cause, then one of the powers reserved to the United States and prohibited by it to the states, under the TENTH AMENDMENT of the Constitution, was violated. This would give cause for that individual to have a suit arising under the Constitution.

VI

Conclusion

Barbee's removal was based solely on complaints rendered the Inspector General and so therefore, the Department of the Army, Office of the Inspector General is the "appropriate authority" to state that Barbee suffered an unwarranted personnel action. In accordance with the United States vs. Fausto, a suit for back pay will lie.

Secretarial regulaton, TPR 752, paragraph 2-19,c,(2) identifies the "appeal" in 32 USC 709(e) 5 as being an administrative review, and so does not bar a judicial suit as interpreted by the lower courts.

The inclusion of 5 USC 2108 in 32 USC 709(f) as interpreted by the lower courts essentially down grades an honorably discharged veteran, who has been unlawfully removed, to that status of a soldier who has dishonorably discharged, leaving him

with no recourse to clear his name.

This case presents important Constitutional and regulatory questions regarding the exact boundaries of the State Adjutant General in the administering of 32 USC 709 and Secretarial regulations as they apply to National Guard Technicians. This Court has the opportunity to clarify the exact status of veterans serving as technicians, and the benefits they retain, and the exact boundaries placed on the Adjutant General by Secretarial regulations and 32 USC 709.

Respectfully submitted,

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Dated April 24, 1989

CERTIFICATE OF SERVICE

I hereby certify under the penalty of perjury that on this 24th day of April 1989, I caused to be placed in the United States mail (first-class, postage prepaid) copies of Petitioner's PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT addressed as follows:

JOHN S. GROAT, ATTORNEY
Department of Justice
Commercial Litigation Branch
ATTN: Classification Unit
2nd Floor, Todd Building
Washington, D.C. 20530

24 April 1989

Elmer R Barbee
ELMER R. BARBEE

ATTORNEY, PRO SE

In the United States Claims Court

No. 230-86C

(Filed: March 3, 1988)

ELMER R. BARBEE, Plaintiff, v. THE UNITED STATES, Defendent.	Jurisdiction; U.S. Fausto, claim for back pay, excepted service employee; due process; tortious conduct actionable in Claims Court; civil rights claim; statutory claims not mandating compensation.

Elmer R. Barbee, Wash., D.C., pro se, for plaintiff.

John S. Groat, with whom were Asst. Atty.

Gen. Richard K. Willard, David M. Cohen, and Thomas W. Petersen, Wash., D.C., for defendent.

OPINION

SMITH, Chief Judge.

This case comes before the court on plaintiff's request for judicial review of an administrative decision by the Adjutant General off the North Carolina Army

National Guard. Plaintiff's complaint alleges wrongful termination based on both substantive and procedural grounds. The Government has not responded by way of answer but has moved for dismissal of plaintiff's complaint for lack of jurisdiction.

Facts

Plaintiff, Elmer R. Barbee, was a pilot with the North Carolina Army Aviation Facility from 1973 to 1980. Plaintiff's difficulties arose with North Carolina Army National Guard when his first level and second level supervisors refused to reissue his flight clearance. This flight clearance was an essential condition of his employment.

On October 16, 1979, plaintiff appealed his supervisor's refusal to the Adjutant General. The Adjutant General determined that although plaintiff's general allegations had some merit, they were insufficient to overturn

his supervisors' decision. On February 22, 1980, plaintiff's first level supervisor sought plaintiff's removal. The Adjutant General sustained the action, and on April 11, 1980, plaintiff was officially discharged.

On April 7, 1986, plaintiff filed a complaint with this court for damages in the amount of 1.5 million dollars in which he alleged several violations of his rights. First, plaintiff contends that the required procedures followed under the Technician Personnel Pamphlet, which were designed for his protection, constituted nothing but a pro forma undertaking since his supervisors were intent on his removal regardless of what those procedures revealed. Plaintiff secondly contends that his first level supervisor downgraded his performance ratings and proposed his removal as retaliation for plaintiff's appeal of that

supervisor's decision not to reissue his flight clearance. Plaintiff's third contention pertains to the Adjutant General's alleged bias against plaintiff. Plaintiff's fourth contention is that the Adjutant General's suggestion to plaintiff that he seek psychiatric counseling on his own initiative was in violation of the Rehabilitation Act of 1973. Plaintiff's last contention is that his civil rights were infringed because of an alleged conspiracy between the Adjutant General and his supervisors.

Discussion

In plaintiff's complaint, in which he requested damages in the amount of 1.5 million dollars, he failed to specifically allocate the damages amongst his separate claims. However, it is not possible that the total 1.5 million dollars of damages sought can relate exclusively to the back pay claim since plaintiff earned a step 4,

GS-12 salary, and the time period in question only dates back to 1980. Therefore, this court can readily assume that some portion of plaintiff's 1.5 million dollar claim relates to the other contentions plaintiff raises in his complaint.

Plaintiff's claims, other that the back pay claim, are clearly not within this court's jurisdiction. These claims are based on allegations of tortious conduct, violations of due process and other civil rights, and violations of statutory law.

It is clear that private parties cannot bring an action before the Claims Court sounding in tort. E.g., Shanbaum v. United States, 1 Cl. Ct. 177, 197 n.3 (1982), aff'd without op., 723 F 2d 69 (Fed. Cir. 1983); McClary v. United States, 775 F.2d 280, 282 (Fed. Cir. 1985). Yet, this is not to say that an action is beyond the bounds of this court "simply because

elements of tort are present in the claim." Burtt v. United States, 176 Ct. Cl. 310, 314 (1966) (per curiam). For example, this court has jurisdiction over takings claims under the Fifth Amendment, Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974), even though those cases may entail the tortious element of trespass. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (takings claim arising from a law requiring a landlord to provide access to cable television workers). The court may additionally review actions involving elements of tort where the action may be brought as a breach of contract. Gregory Lumber Co. v. United States, 9 Cl. Ct. 503 (1986), or where the action involves elements of tort that tive rise to a claim based upon a contract implied-in-fact. See Kirkendall v. United States, 90 Ct. Cl. 606, 31 F. Supp 766 (1940) (plaintiff has a right to a refund

of its money wrongfully taken and applied to a third party's taxes). Nevertheless, even though some tortious conduct can be brought before the court as discussed above plaintiff's tort claims cannot be construed so as to provide this court with jurisdiction since they do not raise contractual, constitutional or statutory claims over which we do have jurisdiction.

Plaintiff's constitutional claims must also be dismissed. While this court, like all federal courts, is a guardian of the due process clause, it does so in different contexts. See .g., Carruth v. United Sttes, 224 Ct. Cl. 755 (1977) (per curiam). Plaintiff's civil rights claims arise from statutory law, but those claims are, nevertheless, outside of this court's jurisdiction as well. E.g., Alabama Hospital Assoc. v. United States, 228 Ct. Cl. 176, 656 F. 2d 606, cert. denied, 496 U.S. 943 (1982). Williams v. United

States, 212 Ct. Cl. 544 (1976).

As for plaintiff's allegations relating to statutory violations of 5 U.S.C. 702, 2302(b)(9), 4302, 7511 (1982), and of 29 U.S.C. 791 (1982), plaintiff should be reminded that not every statutory claim gives rise to money damages unless the statute "in itself...can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." United States v. Testan, 424 U.S. 392, 403 (1976) (quoting Eastport S.S. Corp. v. United States, 178 Ct. Cl., at 599, 607, 372 F. 2d, 1002, 1008-1009) (1967). None of the statutes raised by plaintiff can be interpreted to mandate compensation.

Plaintiff's main claim is for back pay. See generally 5 U.S.C. 5596 (1982). Most such claims are normally brought before the Merit Systems Protection Board, but plaintiff, an excepted service

employee). Now, however, in light of the recent Supreme Court decision in United States v. Fausto, No. 86-595 (U.S. January 25, 1988), it is clear that the Claims Court also lacks jurisdiction to review plaintiff's appeal for back pay. This court lacks jurisdiction even though palintiff has no alternate remedies available. Speaking to this exact point in Fausto, the Court noted of the Civil Service Reform Act:

> In the context of the entire statutory scheme, we think it displays a clear congressional intent to deny the excluded employees the protections of Chapter 75--including judicial review--for personnnel action covered by that chapter.
>
> Id. at 8.

Consequently, the sole remedy provided to plaintiff from the alleged administrative violations by his first and second level supervisors, was his appeal to

the Adjutant general. With that appeal having failed, plaintiff has no alternative but to end his course of litigation.

Conclusion

For the above reasons, this court finds that it lacks jurisdiction to hear plaintiff's claims. Accordingly, defendent's motion for dismissal is granted, and the Clerk is directed to dismiss plaintiff's complaint.

IT IS SO ORDERED.

No costs.

LOREN A. SMITH

Chief Judge

Note: This opinion has not been prepared for publication in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

UNITED STATES COURT OF APPEALS for the FEDERAL CIRCUIT

88-1374

ELMER R. BARBEE,

Plaintiff-Appelant,

v.

THE UNITED STATES,

Defendent-Appellee.

DECIDED: January 27, 1989

Before MARKEY, Chief Judge, RICH and SMITH, Circuit Judges. PER CURIAM.

DECISION

The decision of the United States

Claims court, No. 230-86C, dismissing Elmer R. Barbee's (Barbee's) complaint for lack of jurisdiction, is affirmed.

OPINION

Barbee does not contest that he was an excepted service employee and that the Supreme Court held in United States v. Fausto, 108 S. Ct. 668 (1988) that the Civil Service Reform Act repealed any previously existing Tucker Act jurisdiction to entertain removal or suspension challenges brought by such employees. It is therefore clear that the Claims Court properly dismissed Barbee's complaint.

We need not reach Barbee's argument that Fausto is inapplicable to "preference eligible veterans" because it would not help Barbee. National Guard Technicians are not "preference eligible veterans." 32 U.S.C. 709 (f) (1982), pertaining to National Guard Technicians, states that section 2108 of title 5 (defining

"preference eligible veterans") does "not apply to any person employed under this section." Pursuant to statute, Barbee's right of appeal "shall not extend beyond the adjutant general of the jurisdiction concerned." 32 U.S.C. 709 (e) (5).

The legislative history cited by Barbee in his reply to the government's response to this court's October 6, 1988 Order actually hinders his case. House Report No. 1823, reprinted in 1968 U.S. Code Cong. & Admin. News 3318, 3331, states:

> The so-called veterans' preference provisions contained in title 5, United States Code, are not presently applicable to [National Guard] technicians since they are State employees. The bill, in containing a provision making the veterans' preference provisions not applicable to technicians, will continue the existing practice on this matter.

C-1

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

No.

SPECIAL COUNSEL,

Petitioner,

v.

LESLIE T. EVERETT

Respondent,

COMPLAINT FOR DISCIPLINARY ACTION

The Special Counsel brings this action pursuant to 5 U.S.C. 1206 (a) and (g), and the Board has jurisdiction pursuant to 5 U.S.C. 1205 and 1207.

COUNT ONE [Violation of 5 U.S.C. 2302 (b)(9) - Reprisal for Exercise of Appeal Rights]

1. Respondent Leslie T. Everett is the State Aviation Officer (Aircraft Pilot

Supervisor), GM-14, North Carolina Army National Guard (NCANG), Raleigh, North Carolina, At all times relevant to this complaint Everett served as the Facility Commander (Aircraft Pilor Supervisor), GS-13, NCANG, Raleigh, North Carolina, and had the authority to take, direct others to take, recommend, or approve personnel actions with respect to civilian technician employees of the NCANG, Raleigh, North Carolina.

2. Elmer R. Barbee was employed as an Aircraft Maintenance Officer (Pilot), GS-12, with the NCANG, North Carolina Army Aviator Facility at Morrisville, North Carolina from on or about October 7, 1978, until his removal on April 11, 1980.

3. At all times relevant to this complaint Bruce C. Guard was State Aviation Officer (Aircraft Pilot Supervisor), GS-13, and was Barbee's second-level supervisor.

4. On or about October 16, 1979, Barbee

went to the Adjutant General of the NCANG to complain that Everett, his first-level supervisor, and Guard were not assisting him in his efforts to regain clearance for flight status, an essential requirement of his job. By these actions, Barbee, in his military status, exercised an appeal right granted by the Uniform Code of Military Justice, 10 U.S.C. 938.

5. The Adjutant General directed Barbee to inform Chief of Staff Col. Earl Huie of his allegations. Barbee did so on October 18, 1979. On or about October 23, 1979, Col. Huie directed the Inspector General to investigate Barbee's allegations. Barbee, in his civilian capacity, had the right to register his complaint, orally or in writing, with the Inspector General. Army Regulation 20-1, Chapter 3, paragraph 3.

6. On or about October 18, 1979, the Adjutant General called Guard and Everett into his office, confronted them with

Barbee's allegations, and informed them that he was referring the matter to the Inspector General for investigation.

7. During late October and early November 1979, the Inspector General conducted an investigation of Barbee's allegations. The Inspector General interview Barbee, Everett and others. In addition to repeating his general complaints concerning his flight status, Barbee also disclosed to the Inspector General that Guard had been conducting private business from his office. In his November 12, 1979, report of investigation, the Inspector General concluded that Barbee's general allegations against Everett were not substantiated. He concluded that Barbee made no false statements. The Inspector General sustained Barbee's specific allegation that Guard was conducting private business on duty time. As a result of the Inspector General's findings, Guard was suspended for

the period April 20-26, 1980, for conducting personal business while on duty.

8. On December 19, 1979, Everett gave Barbee a satisfactory annual performance rating. Because Barbee had received excellent ratings for several years immediately prior to his 1979 rating, he requested an official review of the performance rating from the State Inspector Review Panel. On February 25, 1980, Everett responded to Barbee's request, and as justification for his rating of Barbee, referred to Barbee's October 1979 allegations against him which resulted in the Inspector General's formal investigation.

9. Everett has admitted that in late December 1979, he was intent on seeking Barbee's removal because Barbee made "those irresponsible statements against me and the fact that he was trying to destroy my career and my profession..."

10. On February 22, 1980, Everett proposed Barbee's removal. He gave the following reasons:

"1.....During a recent Inspector General Investigation you made false, malicious, unfounded and highly irresponsible statements against me (your supervisor) with the express intent to destroy the reputation, authority, and official standing of me in my position as facility commander.

"2. You, in a sworn statement (DA Form 3881 attached) accused me of personal harrassment against you and job imcompetence in my duties. In a thorough and impartial investigation involving sworn testimony by personnel who (sic) I assume you made against me, it was determined the charges against me were totally unsubstantiated.

"3. I consider your acts in this regard to be of the highest magnitude (sic) in your efforts to have me relieved of my job. The statement made by you to Major Owens to the effect that it looked as if you were going and you were going to take Everett and Guard with you, leaves no doubt in my mind the intent behind the charges you initiated against me.

"4. I regard your charges against me that resulted in the Inspector General investigation to be a deliberate attempt to slander me, to bring discredit to me and my position embarrass me and a flagrant gross effort to undermine my position to the absolute maximum and to create the maximum dissension possible within the AASF #1 workforce.

11. Barbee was removed on April 11, 1980, based on Everett's recommendation.

WHEREFORE, Everett violated 5 U.S.C. 2302(b)(9) in that, on or about February 22, 1980, in reprisal for Barbee's exercise of appeal rights, Everett recommended Barbee's removal. The penalties provided by law for violation of 5 U.S.C. 2302(b)(9) include removal, reduction in grade, debarment from federal employment for a period not to exceed 5 years, suspension, reprimand, or assessment of a civil penalty not to exceed $1,000.

ACCORDINGLY, the Special Counsel request that the Board find that Leslie T. Everett committed a prohibited personnel practice in violation of 5 U.S.C. 2302(b)(9) and order such disciplinary action under 5 U.S.C 1207(b) as the Board deems appropriate.

Respectfully submitted

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Washington D.C.
July 17, 1984
tc

D-1

DEPARTMENT OF THE ARMY
OFFICE OF THE INSPECTOR GENERAL
WASHINGTON, D.C. 20310-1700

March 7, 1989

Assistance Division

Lieutenant Colonel Elmer R. Barbee
Post Office Box 130
Manchester, Kentucky 40962

Dear Colonel Barbee:

This is a final reply to your Army Inspector General Action Request of February 1, 1989. Your concerns focused on allegations of retribution, which you feel violated the June 15, 1978, version of Army Regulation (AR) 20-1.

The matters you presented were reviewed by the Chief of Investigations Division, the Inspector General Legal Advisor, and the Chief of Assistance Division. Based on the November 12, 1979, Report of Formal Investigation and the provisions of AR 20-1 in force at the time, we find that AR 20-1 (for which this agency is the proponent) should not have been cited as the basis for

adverse action against you.

You alledged that Major Leslie Everett was incompetent in his position, that he used his position to harass you personally, and that there was gross negligence on the part of Major Everett against you.

On November 12, 1979, the State of North Carolina Inspector General, Colonel Charles R. Nielsen, rendered his Report of Formal Investigation, wherein he concluded that the allegations made by you, against Major Everett, were not substantiated. However, Colonel Nielsen did not substantiate that you had made "untruthful statements" against Major Everett. Major Everett, as a result of the ROI, subsequently removed you from your duties, as cited in his "Notice of Proposed Adverse Action (Removal)", dated February 1980. The June 15, 1978, version of AR 20-1 (change 1, paragraph 3-4) states:

"Any person on duty with the Department of the Army who, under the guise of presenting a legitimate complaint to an Inspector General, knowingly makes untruthful statements will be subject to disciplinary action. The appropriate commander will be informed of the details of any such incident."

Since the Inspector General ROI contains no such determination, there was no basis for taking disciplinary action against you, under the provisions of AR 20-1. AR 20-1. AR 20-1 clearly prohibits commanders from taking adverse action against soldiers for complaining to the inspector general. Furthermore, AR 20-1, paragraph 1-12, (records release), contains the following requirement when one is under consideration for an adverse personnel action such as "relief from duties":

"... relief from duties where there are no other sufficient records, a commander or head of an agency proposing to use an Inspector General record in support of such action will identify that portion of the record which the commander or agency head proposed be used by the command and will coordinate with the Office of The Inspector General prior to initiation of action."

There is no record that the Office of The Inspector General ever received such a request for the release of inspector general records for the above stated purpose. Therefore, inspector general records should not have been used as a basis for your dismissal.

Thank you for bringing this important matter to your attention.

Sincerely,

Marcia Rinkel
Colonel, Inspector General
Chief, Assistance Division

Supreme Court, U.S.
FILED
JUL 19 1989
JOSEPH F. SPANIOL, JR
CLERK

No. 88-1737

In the Supreme Court of the United States

OCTOBER TERM, 1989

ELMER R. BARBEE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
STUART E. SCHIFFER
Acting Assistant Attorney General
DAVID M. COHEN
JOHN S. GROAT
Attorneys

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Washington, D.C. 20530
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QUESTION PRESENTED

Whether the court of appeals correctly held that the United States Claims Court does not have jurisdiction over petitioner's claim that he was improperly discharged from his job with the North Carolina Army National Guard.

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In the Supreme Court of the United States

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ELMER R. BARBEE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Claims Court (Pet. App. A1-A10) is reported at 14 Cl. Ct. 387. The opinion of the court of appeals (Pet. App. B1-B3) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 27, 1989. The petition for a writ of certiorari was filed on April 24, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 709 (32 U.S.C.) provides:

§ 709. Technicians: employment, use, status

(a) Under regulations prescribed by the Secretary of the Army * * * persons may be employed as technicians in—

(1) the administration and training of the National Guard; and

(2) the maintenance and repair of supplies issued to the National Guard or the armed forces.

* * * * *

(e) Notwithstanding any other provision of law and under regulations prescribed by the Secretary concerned,

* * * * *

(3) a technician may, at any time, be separated from his technician employment for cause by the adjutant general of the jurisdiction concerned;

* * * * *

(5) a right of appeal which may exist with respect to clause * * * (3) * * * shall not extend beyond the adjutant general of the jurisdiction concerned;

* * * * *

(f) Sections 2108, 3502, 7511, and 7512 of title 5 do not apply to any person employed under this section.

STATEMENT

1. Petitioner filed this action against the United States in the Claims Court in 1986. Petitioner alleged in his complaint that he was a pilot with the North Carolina Army National Guard from 1973 to 1980 (Pet. App. A2). He alleged that, in 1979, his supervisors refused to give him clearance to fly. Petitioner complained to National Guard officials about his supervisors' decision, as well as other

aspects of their performance (*ibid.*; Compl. paras. 7-11). Petitioner then asked the Adjutant General of the North Carolina Army National Guard to review the matter. The Adjutant General "determined that although [petitioner's] general allegations had some merit, they were insufficient to overturn his supervisors' decision" (Pet. App. A2-A3). Later, on February 22, 1980, petitioner's immediate supervisor proposed to dismiss petitioner from the National Guard. The Adjutant General sustained that proposal, and petitioner was discharged on April 11, 1980 (*id.* at A3).

Petitioner alleged in his complaint in the Claims Court that the Adjutant General was biased against him, and that petitioner was denied procedures guaranteed by internal rules of the National Guard (Pet. App. A3-A4). Petitioner asked for damages in the amount of $1.5 million (*id.* at A4).

2. The Claims Court granted the government's motion to dismiss the complaint. The Claims Court first ruled that it had no jurisdiction over petitioner's claims sounding in tort and alleging violations of civil rights statutes (Pet. App. A5-A8).[1] The court then addressed petitioner's "main claim" for back pay (*id.* at A8). Relying on *United States* v. *Fausto,* 108 S. Ct. 668 (1988), the court held that it lacked jurisdiction over that claim as well. It ruled that the Civil Service Reform Act of 1978 did not provide for judicial review of the Adjutant General's decision to discharge petitioner. The Claims Court stated that "the sole remedy to [petitioner] from the alleged administrative violations by his * * * supervisors, was his appeal to the Adjutant general" (Pet. App. A9-A10).

3. The court of appeals affirmed. The court noted that petitioner was an "excepted service employee" under the

[1] Petitioner did not challenge that aspect of the Claims Court decision on appeal.

Civil Service Reform Act (Pet. App. B2). The court then observed that *Fausto* held that such employees may not bring an action for back pay in the Claims Court if that action challenges the validity of an employment decision (*ibid.*). The court of appeals concluded, therefore, that "the Claims Court properly dismissed [petitioner's] complaint" (*ibid.*).

The court of appeals also rejected (Pet. App. B2-B3) petitioner's contention that he was entitled to review under the Civil Service Reform Act because he was a so-called "preference eligible veteran" under 5 U.S.C. 2108. The court relied on 32 U.S.C. 709(f), which states that Section 2108 of Title 5 does not apply to persons employed by the National Guard.[2]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with the decision of any other court of appeals. Thus no further review is warranted.

1. Petitioner renews his claim (Pet. 12-23) that he is entitled in the Claims Court to review of the Adjutant General's decision to discharge him. That contention is foreclosed by *United States* v. *Fausto, supra.*

In *Fausto,* this Court examined the interplay between the Back Pay Act (5 U.S.C. 5596(b)(1)) and the Civil Service Reform Act and held that members of the excepted service are not entitled to judicial review of adverse personnel actions. 108 S. Ct. at 677. The Court noted, however, that "if an employee is found by an 'appropriate authority' to have undergone an unwarranted personnel action a suit for backpay will lie" under the Back Pay Act.

[2] Section 709 of Title 32 covers the employment of "technicians" by the National Guard. It is undisputed that petitioner was such a technician. See Pet. 6.

Ibid. In this case, the "appropriate authority" is defined by 32 U.S.C. 709(e)(3) as the Adjutant General. And 32 U.S.C. 709(e)(5) states that a "right of appeal * * * shall not extend beyond the adjutant general." Accordingly, because the Adjutant General determined that petitioner's discharge was proper, the lower courts correctly dismissed petitioner's claim for back pay.[3]

Petitioner nevertheless contends (Pet. 16-20) that he is entitled to judicial review because he is a "preference eligible" veteran under the Civil Service Reform Act. As the Court noted in *Fausto* (108 S. Ct. at 672-673), the Civil Service Reform Act includes such veterans in the class of employees who are entitled to review of adverse employment decisions. See 5 U.S.C. 2108, 7511, 7512. But 32 U.S.C. 709(f) expressly excludes employees of the National Guard from those provisions of the Civil Service Reform Act. Thus the court of appeals correctly held that, because petitioner was employed as a technician by the National Guard, he was not entitled to review " 'beyond the adjutant general' " (Pet. App. B3) (quoting 5 U.S.C. 709(e)(5)).

Moreover, preference eligible veterans are entitled under the Civil Service Reform Act to administrative review before the Merit Systems Protection Board, followed by judicial review in the Federal Circuit. See *Fausto,* 108 U.S. at 672-673. Here, petitioner filed his action for back pay in the Claims Court. Thus, even if petitioner were a preference eligible veteran entitled to further review under the Civil Service Reform Act, the Claims Court properly dismissed the complaint.

---

[3] Petitioner insists (Pet. 12-14) that the Claims Court had jurisdiction over his allegations of wrongful discharge because he claims that the Adjutant General violated internal regulations of the Army. The point of *Fausto,* however, is that such claims are not reviewable in the Claims Court under the Tucker Act.

2. Petitioner next argues (Pet. 15-16) that, under *Fausto,* he was entitled to bring his action for back pay because an "appropriate authority" has determined that he was improperly discharged. He cites a letter dated March 7, 1989, that he received from Colonel Rinkel in the Army's Office of the Inspector General in which Colonel Rinkel states that the Adjutant General acted improperly in 1980. That letter, which petitioner received after the Federal Circuit issued its opinion, does not cast any doubt on that court's judgment. If petitioner believes that new evidence supports his claim under the Back Pay Act, he should bring the matter to the Claims Court in the first instance.

In any event, the March 7, 1989, letter does not appear to be the decision of an "appropriate authority" as that phrase is used in the Back Pay Act. Under 32 U.S.C. 709, the Adjutant General is given the final word on whether to discharge an employee in petitioner's position. And the Inspector General of the Army has no authority to correct a personnel action taken by the Adjutant General against a technician. See Army Reg. 20-1, paras. 1-25c, 5-1, 5-2a (Sept. 16, 1986). Accordingly, the letter from Colonel Rinkel in the Inspector General's Office merely expressed an opinion of the writer;[4] it was not a finding by an "appropriate authority" that petitioner's discharge was illegal.[5]

---

[4] We are informed by the Army that the Office of the Inspector General has determined that Colonel Rinkel's letter of March 7, 1989, was incorrect. By letter dated May 30, 1989, Colonel Rinkel informed petitioner that she believed the Adjutant General did not violate internal Army regulations. See App., *infra,* 1a-2a.

[5] Petitioner's final contention (Pet. 20) that his claim arises under Article I, Section 8, of the Constitution is frivolous. The constitutional provision that petitioner cites gives the Congress the power to raise and organize a militia. That provision is plainly not implicated by a

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General
STUART E. SCHIFFER
Acting Assistant Attorney General
DAVID M. COHEN
JOHN S. GROAT
Attorneys

JULY 1989

---

claim that an adjutant general of the National Guard improperly discharged an employee.

APPENDIX

[SEAL]

DEPARTMENT OF THE ARMY
OFFICE OF THE INSPECTOR GENERAL
WASHINGTON, D.C. 20310-1700

May 30, 1989

Assistance Division

Lieutenant Colonel Elmer R. Barbee
Post Office Box 130
Manchester, Kentucky 40962

Dear Colonel Barbee:

On March 7, 1989, I sent you a final reply to your February 1, 1989, Army Inspector General Action Request (IGAR). Your IGAR focused on allegations of retribution which you felt violated the June 15, 1978, version of Army Regulation (AR) 20-1, Inspector General Activities and Procedures. My reply contained several findings about AR 20-1 and the removal action taken against you.

Upon further legal review of this matter, it is clear that the provisions of AR 20-1 cited in my March 7, 1989, letter did not apply to your case.

The June 15, 1978, version of AR 20-1 had a provision in paragraph 5-1b which said, "Army regulations do not apply to the ARNG except where specifically made applicable or where made applicable in whole or in part by National Guard regulations or other National Guard Bureau publications." Paragraph 1-2, Applicability, which said, "This regulation applies to the Active Army, the U.S. Army Reserve and the Army National Guard", did not be-

come effective until February 15, 1980, when Change No. 1 to that version of AR 20-1 was implemented. No National Guard regulations or other National Guard Bureau (NGB) publications existed between June 15, 1978, and February 15, 1980, which made AR 20-1 applicable in whole or in part to members of the ARNG while not in the active Federal service of the United States.

Since the provisions of AR 20-1 cited in my March 7, 1989, letter did not apply to your October 24, 1979, IGAR and the State Inspector General's November 12, 1979, report of investigation concerning your allegations, my final reply to your IGAR was incorrect. I offer no opinion on the applicability of North Carolina laws or state regulations to your case.

Additionally, I have reviewed your May 5, 1989, letter concerning your disagreement with the North Carolina Adjutant General's April 25, 1989, letter to you. Unfortunately, for the above mentioned reasons, I am unable to pursue this matter further. I regret any inconvenience this may have caused you.

Sincerely,

Marcia Rinkel
Colonel, Inspector General
Chief, Assistance Division

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Supreme Court, U.S.
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CLERK

Case No. 88-1737

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

ELMER R. BARBEE

PETITIONER

VS

THE UNITED STATES

RESPONDENT

SUPPLEMENTAL BRIEF TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT.

Elmer R. Barbee

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EDITOR'S NOTE:

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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SUPPLEMENTAL BRIEF TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Petitioner, Elmer R. Barbee respectfully submits in compliance with Rule 22.6, this supplemental brief and presents interviewing material that was not available at the time of Petitioner's last filing.

STATEMENTS OF FACTS

On 30 May 1989, COL Marcia Rinkel of the Office of the Inspector General, mailed Petitioner the enclosed letter. (APPENDIX A) On 8 June 1989 (APPENDIX B), Petitioner replied to that letter and stated that the proposed adverse action that violated AR 20-1 was presented to Petitioner on 22 February 1980, therefore, violating the 15 January 1980 version of AR 20-1. Petitioner

respectfully requested that the Office of the Inspector General provide a corrected copy of the 7 March 1989 letter reflecting the appropriate provisions of AR 20-1, dated 15 January 1980. No response was received.

Upon telephonic follow-up, Petitioner was informed by COL Herbert Williams, Legal Advisor, Office of the Inspector General (TIG), that legal representatives from National Guard Bureau, the Department of the Army, (The Judge Advocate General, TJAG), and the Department of Justice had met in his office and that as a result of that meeting, the 30 May 1989 letter was prepared. COL Williams stated that all future correspondence would be reviewed by Major Cathy Cates, TJAG, prior to the submission of any responses from the office of the Inspector General.

On 18 June 1989, Petitioner submitted an Inspector General Action Request (IGAR) and provided documented evidence that for the past 9 years the Army National Guard and all other concerned agencies had considered both the 15 June 1978 and the 15 January 1980 versions of AR 20-1 as having been applicable to the Inspector General Investigation conducted in October and November 1979 and to the subsequent adverse action initiated against Petitioner on 22 February 1980. (APPENDIX C)

On 27 June 1989, Petitioner again spoke with COL Herbert Williams, TIG, and pointed out that on page i of the 15 June 1978 version of AR 20-1, it states in reference to the use of this regulation that:

"It provides policies, procedures, and guidance for conduct of The

Inspector General program for the Active Army, Army Reserves, and the Army National Guard. Local supplementation of this regulation is permitted but is not required. If supplements are issued, Army Staff agencies and major Army Commands will furnish one copy to HQDA (DAIG-ZX) WASH D.C. 20310; other commands will furnish one copy of each to the next higher headquarters."

Since COL Rinkel's letter of 30 May 1989 (APPENDIX A) stated that no NGB Publications (supplements) existed between 15 June 1978 and 15 February 1980 as to the applicability of AR 20-1, then those policies, procedures and guidlines as issued the National Guard by the Secretary of the Army were in force as presented.

COL Rinkel's letter of 30 May 1989 also stated that:

> "The June 15, 1978 version of AR 20-1 had a provision in paragraph 5-1b which said 'Army regulations do not apply to the ARNG except where specifically made applicable or where made applicable in whole or in part by National Guard regulations or other National Guard publications.'"

This quote was taken out of context in that CHAPTER 5 of the 15 June 1978 version of AR 20-1 is entitled "INSPECTOR GENERAL INSPECTION OF THE ARMY NATIONAL GUARD AND ARMY RESERVE." This quote can be found today in paragraph 6-6c of AR 20-1, dated 16 September 1986, and still only applies to inspections. Chapter 5 of the 15 June 1978 version of AR 20-1 did not cover Inspector General Investigations

except under paragraph 5-4h, Inpsection Objectives: This paragraph provides that:

> "When conducting general inspections of ARNG and the USAR, Inspectors General will determine the overall state of readiness and training to include whether --
>
> h. A procedure has been established and is being used to receive, make inquiry into and respond to all Inspector General action requests."

An inspection requirement of The Inspector General was to assure the ARNG had a procedure established to respond to all IGAR's. In that no supplemental changes were submitted to NGB by the North Carolina Army National Guard, AR 20-1 dated 15 June 1978 was effective as issued by the Secretary of the Army.

This was the regulation in effect and utilized by the National Guard and Charles R. Neilsen, NCARNG, IG who received Petitioner's complaints as rendered on DA Form 1559 (See APPENDIX C). CHAPTER 4, "INVESTIGATIONS AND INQUIRIES" covered investigations and in that chapter there were no exclusions for the National Guard or Army Reserve.

Both the 15 June 1978 and 15 January 1980 versions of AR 20-1 contained under paragraphs 1-2 and 1-3 respectively, "Statutory Authority," the following:

> "Title 32 United States Code, Section 105 provides for the Insepction of the Army National Guard (ARNG) and for conducting <u>investigations</u> of the ARNG on matters having Federal Concern."

The investigation conducted was a matter of Federal concern in that all parties

involved were technicians, therefore, employees of the Department of the Army and of the United States. Federal funds, time and facilities were involved.

In both the 15 June 1978 and 15 January 1980 versions of AR 20-1, paragraphs 1-4c and 1-5c respectively, "Status of Inspectors General," it states:

> "Officers detailed as Inspectors General will not be appointed as Investigating officers under Articles 32 and 138, UCMJ; under AR 15-6; or under any other regulation or directive providing for the appointment of investigating officers, members of adminstrative boards, or members of courts-martial. Inspectors General will not be given other similar duties which may subsequently disqualify

them from making impartial investigations or inquiries into any function or any aspect of the activities of the HQDA staff agency or command to which they are assigned."

COL Charles Neilsen was school trained as an Inspector General by the Department of the Army; he wore the Inspector General insignia; he was allowed by regulation to administer oaths before taking sworn testimony; and he was detailed an Inspector General by military TO&E assignment with the National Guard. Even though other types of investigations were available for use by the head of the agency, this Inspector General was chosen to conduct an Inspectors General Investigation. COL Charles Neilsen was prohibited by regulation from conducting any other investigation except for an Inspector

General Investigation in accordance with AR 20-1 dated 15 June 1978.

On 11 July 1989, Petitioner received from COL Marcia Rinkel, TIG, a letter (APPENDIX D) dated 5 July 1989. Telephonic communication with COL Herbert Williams revealed that this was the response to Petitioner's 8 June and 18 June 1989, Inspector General Action Request. This was to be the only response rendered at the advice of Mr. John S. Groat of the Department of Justice. This letter states that no further substantive response will be provided, even though INSPECTOR GENERAL ACTIVITIES AND PROCEDURES dated 16 September 1986 states in paragraph 1-5h that the "TIG will--

h. Maintain a system under the law, regulations, and the requirements of <u>due process</u>, through which Service members

and others may request aid in resolving problems related to the Army, without fear of compromise, reprisal, or unnecessary disclosure of information. Also, the IG will establish a procedure to monitor each case until it is resolved."

CONCLUSIONS

The 15 June 1979 version of AR 20-1 was utilized by the National Guard to conduct the October-November 1979 Inspector General Investigation as evidenced in sworn testimony given by COL Charles R. Neilsen, NCARNG, Inspector General. (provided in APPENDIX C)

The Office of the Special Counsel (OSC) is the only other agency that has had access to all the pertinent information and that has investigated

all of the events from October 1979 through Petitioner's appeal denial by the Adjutant General in November 1980. The OSC's investigation found that the National Guard had violated both the CSRA of 1978 and AR 20-1. In 1984, the OSC charged Petitioner's technician supervisor with a prohibited personnel action; Denial of Appeal Rights (Reprisal Action). COL Rinkel's 7 March 1989 letter explaining the acts of retribution that violated the 15 June 1978 version of AR 20-1 is still valid.

In 1981 and 1982, Petitioner attempted through U.S. Sentators and Congressmen to have an uncensored version of the Inspector General Investigation reviewed in an attempt to resolve this issue informally or to obtain the necessary information required for judicial review in a court of law. The agency continually utilized

AR 20-1 as the authority to deny these requests (See APPENDIX C). To state now, 9 years after the fact, that AR 20-1 does not apply is arbitrary and capricious application of Inspector General regulations by the agency. The 30 May 1989 letter (APPENDIX A) is only an attempt by the agency to provide a defense for the United States Government.

The recommendation by Mr. John S. Groat, Department of Justice, that the Office of the Inspector General provide no further substantive responses to Petitioner's Inspector General Action Request is tantamount to an "obstruction of governmental administration" and is an attempt to deny Petitioner due process before the Supreme Court.

The 7 March 1989 letter from the Office of the Inspector General clearly stated that the head of the agency

proposing to use an Inspector General record in support of a relief from duties action will coordinate with the Office of the Inspector General prior to initiation of that action. There was no record that such a request was made by the Adjutant General for release of inspector general records for that purpose. The Office of the Inspector General is the proponent agency and the "appropriate authority" to state that AR 20-1 was violated by the agency. The letter of 7 March 1989 from the Office of the Inspector General should serve as the agency's admission that Petitioner was the recipient of an unwarranted personal action thereby allowing a suit for back pay to lie.

CERTIFICATE OF SERVICE .

I hereby certify under penalty of perjury that on this 4th day of August 1989, I caused to be placed in the United States mail (first-class, postage prepaid) three copies of Petitioner's SUPPLEMENTAL BRIEF TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT addressed as follows:

Solicitor General
Department of Justice
Washington, D.C. 20530

4 August 1989

Elmer R. Barbee

Elmer R. Barbee

Attorney, Pro Se.

May 30, 1989

Assistance Division

Lieutenant Colonel Elmer R. Barbee
Post Office Box 130
Manchester, Kentucky 40962

Dear Colonel Barbee:

On March 7, 1989, I sent you a final reply to your February 1, 1989, Army Inspector General Action Request (IGAR). Your IGAR focused on allegations of retribution which you felt violated the June 15, 1978, version of Army Regulation (AR) 20-1, Inspector General Activities and Procedures. My reply contained several findings about AR 20-1 and the removal action taken against you.

Upon further legal review of this matter, it is clear that the provisions of AR 20-1 cited in my March 7, 1989, letter did not apply to your case.

The June 15, 1978, version of AR 20-1 had a provision in paragraph 5-1b which said, "Army regulations do not apply to the ARNG except where specifically made applicable or where made applicable in whole or in part by National Guard Bureau publications." Paragraph 1-2, Applicability, which said, "This regulation applies to the Active Army, the U.S. Army Reserve and the Army National Guard", did not become effective until February 15, 1980, when Change No. 1 to that version of AR 20-1 was implemented. No National Guard regulations or other National Guard Bureau (NGB) publications existed between June 15, 1978, and February 15, 1980, which made AR 20-1 applicable in whole or in part to members of the ARNG while not in the active Federal service of the United States.

Since the provisions of Ar 20-1 cited in my March 7, 1989, letter did not apply to your October 24, 1979, IGAR and the State Inspector General's November 12, 1979, report of investigation concerning your allegations, my final reply to your IGAR was incorrect. I offer no opinion on the applicability of North Carolina laws or state regulations to your case.

Additionally, I have reviewed your May 5, 1989, letter concerning your disagreement with the North Carolina Adjuntant General's April 25, 1989, letter to you. Unfortunately, for the above mentioned reasons, I am unable to pursue this matter further. I regret any inconvenience this may have caused you.

Sincerely,

Marcia Rinkel

Colonel, Inspector General

Chief, Assistance Division

8 June 1989

Department of the Army
Office of the Inspector General
COL Marcia Rinkel
Chief, Assistance Division
Washington, D.C. 20310-1700

Dear COL Rinkel:

On 8 June 1989, I received your letter of 30 May 1989. In that letter you stated that my Inspector General Action Request (IGAR) focused on allegations of retribution which I felt violated the June 15, 1978 version of Army Regulation (AR) 20-1, Inspector General Activities and Procedures.

My original IGAR to your office involved what I felt were violations of the 15 January 1980 version of Army Regulation (AR) 20-1. My IGAR involved the "Proposed Adverse Action (Removal)" letter written by Major Leslie T.

Everett and presented to me on 22 February 1980. On 15 February 1980, one week prior to the initiation of that adverse action, Change 1 of the 15 January 1980 version of Army Regulation (AR) 20-1 became effective and applicable for the Army National Guard. Therefore, your office was the appropriate authority to state that there was no basis for the adverse action taken against me. There was never a question as to the validity of the Inspector General Investigation nor the ROI of 12 November 1979.

In that all of those provisions of the 15 June 1978 version of Army Regulation (AR) 20-1 were incorporated in Change 1 of Army Regulation (AR) 20-1, dated 15 January 1980, your letter of 7 March 1989 is still valid. I respectfully request that your office revise your 7 March 1989 letter to

reflect the correct version of. Army Regulation (AR) 20-1, dated 15 January 1980, which was in effect at the time the violations occured, and again state that there was no basis for an adverse action to have been taken against me.

Thanking You in Advance,

Elmer R. Barbee, LTC.

18 June 1989

Department of the Army
Office of the Inspector General
COL Marcia Rinkel
Chief, Assistance Division
Washington, D.C. 20310-1700

Dear COL Rinkel:

Today I conversed by phone with COL Williams of the Office of the Inspector General about the 8 June 1989 letter that I sent to you. I understand that the Inspector General Action Request (IGAR) of that date was forwarded to the Department of the Army, Legal Branch, for a response. I further understand that there is a legal question as to whether or not the 15 June 1978 version of AR 20-1 was considered by the North Carolina Army National Guard to be applicable when the October and November 1979 Inspector's General Investigation

was conducted. To that question, I would like to submit the following:

The Technician Personnel Act. 32 USC 709 (d) states "A technician employed under subsection (A) is an employee of the Department of the Army or the Department of the Air Force, as the case may be, and an employee of the United States." ..... It is clear therefore that I had the right to register my complaints orally or in writing with an Inspector General IAW paragraph 3-3 of AR 20-1 dated 15 June 1978. My complaints were rendered while I was in a technician status, or as a civilian on duty with the Department of the Army, or as defined in 5-1b, in the active Federal service of the United States. I was a National Guardsman only on drill weekends and for two weeks of summer camp each year. The rest of the time I was a civilian employee with the

Department of the Army and was in the active Federal service of the United States.

Your letter of 30 May 1989 states that: "Upon further legal review of this matter, it is clear that the provisions of AR 20-1 cited in my March 7, 1989, letter did not apply to your case.

The June 15, 1978, version of AR 20-1 had a provision in paragraph 5-1b which said, "Army regulations do not apply to the ARNG except where specifically made applicable or where made applicable in whole or in part by National Guard Bureau publications." Paragraph 1-2, Applicability, which said, "This regulation applies to the Active Army, the U.S. Army Reserve and the Army National Guard" did not become effective until February 15, 1980, when

Change No. 1 to that version of AR 20-1 was implemented....." Upon close review of the 15 June 1978 version of AR 20-1, paragraph 1-2 Applicablitiy was non-existent, and so therefore based on this latest interpretation apparently the 15 June 1978 version of AR 20-1 did not apply to the Active Army either.

The 15 June 1978 version of AR 20-1 paragraph 1-2, statutory authority, does however state that: "Title 32, United States Code, Section 105, provides for inspection of the Army National Guard (ARNG) and for the conducting of investigations of the ARNG on matters having Federal concern." Again, it is clear that not only did the 15 January 1980, but also the 15 June 1978 version of AR 20-1 was applicable to the ARNG as well as civilian personnel on duty with the Department of the Army.

Appendix I is the Department of the Army (DA) Form 1559 signed by me on 24 October 1979 and is an Inspector General Action Request. This form clearly states that AR 20-1 is the appropriate regulation, and further states that the proponent agency is the Office of the Inspector General. If the ARNG inappropriately utilized this form, that is a problem for the proponent agency, being your office, not me being a requestor of assistance. The validity of the Inspector General Investigation of October-November 1979 has never been questioned. The ROI dated 12 November 1979 has never been in question. The only area of concern was the Adverse Action proposed by Major Leslie T. Everett on 22 February 1980, After the implementation of the 15 January 1980 version of change 1 to AR 20-1.

Appendix II is page 399 of my Civil Service Hearing conducted July 1980. This page is sworn testimony by Major Leslie T. Everett stating that he at no time prior to initiating the proposed adverse action of 22 February 1980, saw or had access to Inspector General records. He further stated that as of 10 July 1980 he had not had access to Inspector General reports or records.

Appendix III is a Memorandum for Record prepared by the Adjutant General on 28 November 1979. This memorandum indentifies the investigation as that of an Inspector General, and clearly does not indicate that I knowingly made false statements during the investigation or in the presence of the Adjutant General. In fact the Adjutant General was in complete agreement with findings of the investigation and considered it closed

with the exception of the Adverse Action prepared against COL Guard.

Appendix IV is a letter of 11 March 1980 signed by Major Leslie T. Everett. Paragraph 4 of that letter states that COL Nielsen, the Inspector General cited AR 20-1, dated 15 June 1978, as the authority to release to Major Everett his copy of DA Form 3881.

Appendix V is a letter by me of 26 March 1980 requesting IAW AR 20-1 paragraph 1-12, e, dated January 1980, copies of my testimony presented during the Inspector General's Investigation of October and November 1979. Appendix VI is the response provided by Charles R. Nielson, COL. I. G., State Inspector General, Again AR 20-1 is acknowledged and utilized as the appropriate authority for release of Inspector General Records.

Appendix VII is sworn testimony by COL Charles R. Nielsen during my Civil Service Hearing of July 1980. His testimony states that AR 20-1 and TBIG's were used to conduct his investigation, and that no statements made by me were found by him to have been false.

Appendix VIII is a letter of 6 April 1981, sent to Representative Charles O. Whitley by COL William Keeton, NCARNG, Chief of Staff. This letter uses Army Regulations to totally deny a request by a member of Congress for Inspector General records.

Appendix IX is a letter dated 21 June 1982 addressed to me from Senator John P. East. Senator East provided me a letter of 17 June 1982 signed by COL John D. Stuckey, NGB, stating that your office was the releasing authority for Inspector General reports. In inquiring

to your office I was referred to Office of the Adjutant General of North Carolina.

Finally, Appendix X is a reply, addressed to me, dated 24 August 1982, signed by the Senior Deputy Attorney General of North Carolina, Andrew A. Vanore, Jr. Mr. Vanore is also a COL in the NCARNG and was a senior JAG officer for the Adjutant General. In paragraph 4 of his letter he cites AR 20-1 as prohibiting the release of the entire Inspector General's report.

As you can see, the validity of the Inspector General ROI of 12 November 1979, and the application of AR 20-1 has gone full circle. All agencies concerned have indicated that AR 20-1, by either date, was applicable to the ARNG. AR 20-1, by either date, was utilized by NCARNG, NGB, and the

Department of the Army to deny Congressmen and Representatives, both State and Federal, access to Inspector General records in their attempts to assist me in resolving this matter.

FORSCOM Supp 1 to Ar 20-1, dated 16 August 1978, provides for adding to AR 20-1, dated June 1978 subparagraph d to page 1-11, paragraph 1-13, Training. Section (2)(a) states: "Army National Guard and Army Reserve officers detailed as Inspectors General may be nominated to attend courses of instruction under quotas administered by Chief, National Guard Bureau, and HQ FORSCOM respectively, (b). Nominations of ARNG personnel are submitted by State Adjutants General to the Inspector General of the Army through Chief, National Guard Bureau." Paragraph (e) placed the responsibility for the funding and issuance of travel orders

for ARNG on Chief, National Guard Bureau, 2 a. It is clear that the Office of the Inspector General received funds from National Guard Bureau for the purpose of training Inspectors General for the ARNG. How else could ARNG Inspectors General perform their duties if not in accordance with AR 20-1 and TBIG's?

On 24 April 1989, I filed with the Supreme Court, a petition for writ of Certiorari. This is only a petition, and is not a matter of litigation with the Department of the Army. The Solicitor General's Office requested and obtained a thirty day extension in order to confer with the Department of the Army and with National Guard Bureau. Apparently this conferring was not limited to the Department of the Army and National Guard Bureau in that legal representatives from their respective

offices and from the Solicitor General's Office were allowed contact your office direct and convince you that your letter of 7 March 1989 was incorrect in that the 15 January 1980 version of AR 20-1 was not cited.

I am respectfully and formally initiating this Inspector General Action Report Request of your office to provide to me a corrected copy of your 7 March 1989 letter citing the 15 January 1980 version of AR 20-1 which was in effect prior to the issuance of the Proposed Adverse Action (Removal) letter dated 22 February 1980. In that your 30 May 1989 letter, stating that your 7 March 1989 letter was incorrect, was not prepared until after my petition for writ of Certiorari was submitted to the Supreme Court, I am sure there is no policy statement that forbids your office from issuing a corrected letter.

Thanking you in Advance,

LTC Elmer R. Barbee

DA FORM 1559 signed by

Elmer R. Barbee on

24 October 1979

APPENDIX I

For use of this form, see AR 20-1; the proponent agency is the Office of the Inspector General and Auditor General.

INSPECTOR GENERAL ACTION REQUEST

For use of this form, see AR 20-1; the proponent agency is the Office of The Inspector General and Auditor General.

DATA REQUIRED BY THE PRIVACY ACT OF 1974

AUTHORITY: Title 10, USC, Section 3020.

PRINCIPAL PURPOSE: To assess sufficient information to make inquiry into the matters presented and to provide a reference to the instrument(s) and/or item number to answer deficiencies.

ROUTINE USES: Information is used for official purposes within the Department of Defense to answer complaints or respond to requests for assistance, advice or information by Members of Congress and other Government agencies which considered by The Inspector General and Auditor General to be in the best interest of the Army; and in certain cases is used by governmental or other military matters as authorized by the Uniform Code of Military Justice.

DISCLOSURE OF THE SOCIAL SECURITY NUMBER AND OTHER PERSONAL INFORMATION IS VOLUNTARY. HOWEVER, FAILURE TO PROVIDE COMPLETE INFORMATION MAY HINDER PROPER IDENTIFICATION OF THE REQUESTOR, ACCOMPLISHMENT OF THE REQUESTED ACTION(S) AND RESPONSE TO THE REQUESTOR.

LAST NAME – FIRST NAME – MIDDLE INITIAL	GRADE	SSN	DUTY TELEPHONE
BARNES, ELMER L.	04	241-74-3923	733-5069

COMPLETE PRESENT MILITARY ADDRESS (If not military, enter current address, including ZIP Code)

AASF #1 PO Box 1, Morrisville, NC 27560

SPECIFIC ACTION REQUESTED

Accusations against CPT Bruce C. Gaard and Major Leslie Everett as follows:

INFORMATION PERTINENT TO THIS REQUEST (Give additional names if necessary and dates/places if applicable)

CPT Gaard - (1) is incompetent, (2) that CPT Gaard harrasses him, on and off the job, and (3) that he totally abuses his position as Commander of both the Flight Facility and new State Aviation Office.

MAJ Everett - (1) He is incompetent in his position, (2) that he uses his position to harrass MAJ Barnes personally, and (3) that there is gross negligence on the part of both parties against MAJ Barnes.

This information is submitted for the base purpose of requesting assistance, correcting injustices affecting individuals, or eliminating conditions considered detrimental to the efficiency or reputation of the Army. I fully understand that I may be held accountable for any statements which are proved to be knowingly untruthful.

DATE	SIGNATURE
24 October 1979	Elmer L Barnes

EXHIBIT BB

DA FORM 1559 REPLACES EDITION OF 1 MAY 72, WHICH IS OBSOLETE.

Sworn Testimony by

MAJOR Leslie T. Everett, Jr

Civil Service Hearing

July 1980

APPENDIX II

Another reason that there was a delay between 25 October and 22 February was compassion. I have a compassion for Elmer Barbee's family, his wife and kids. To be quite frank about it, I have none for Elmer Barbee.

Another reason in reviewing in my mind what the Adjutant General told me, I wanted to see if it would work. Could Elmer and I work together in a reasonably harmonious and effective relationship for the good of the North Carolina National Guard, regardless of my own personal feeling or regardless of Elmer Barbee's personal feelings.

Another reason for the delay was that I asked Colonel Huie two or three times for written confirmation of clearance by the Inspector General. I consider myself a professional. I consider myself a human being. If

anyone makes accusations and charges against me and they put them in writing, I feel like I have a right to those findings in writing. I did not request anything from the written Inspector General report nor have I had access nor have I seen anything from the Inspector General's report. My counsel has obviously asked me questions that he feels are pertinent to the report, but I have not seen the report, then or now. That was a fourth reason.

The fifth reason is -- and incidentally, on the third time I asked Colonel Huie, I think it was the third time, he said, "Why do you want the written confirmation?" or words to that effect. I told him two things. One, I am entitled to it.

MEMORANDUM FOR RECORD

Prepared by AG William Ingram

28 November 1979

APPENDIX III

AG 28 November 1979

MEMORANDUM FOR RECORD

SUBJECT: Allegations made by MAJ Elmer Barbee against COL Bruce Guard and MAJ Leslie Everett

I informed MAJ Barbee this date that the NCARNG Inspector General had completed his investigation into the allegations made by himself. I informed him that his was a most thorough investigation and that I was in complete agreement with the findings.

I informed MAJ Barbee that the findings did not substantiate any of his allegations against MAJ Everett and that I considered that portion of his allegation closed.

I informed MAJ Barbee that the investigation substantiated only one (1) of his allegations made against COL

Guard and that I was taking appropriate action in that regard and considered his other allegations closed.

At this point, I counseled MAJ Barbee on my feelings as they pertained to his outlook toward his working associates. I advised him that as a layman only, it appeared to me that he continually misunderstood his superiors' motives and recommend to him that he should seek counseling to determine if my observation was correct and that if confirmed, he should seek professional treatment of this problem.

WILLIAM E. INGRAM
Major General, NCARNG
Adjutant General

Letter by Leslie T. Everett

Dated 11 March 1980

APPENDIX IV

AASF #1 11 March 1980

SUBJECT: Requested Information
(Proposed Removal Action)

Major Barbee
Aircraft Maintenance Officer
Army Aviation Support Facility No. 1
Morrisville, NC 27560

1. Reference your letter dated Mar 80 on above subject.

2. The material relied on to support my position in my recommendation for your removal is the fact you made sworn charges against me (personal harassment and job incompetence) against me (your supervisor) and as a result of an extensive Inspector General Investigation the charges were determined to be totally unfounded and unsubstantiated.

3. The reference material relied upon for my authority to make such a recommendation is contained in Technician Personnel Pamphlet (TPP) 904, Appendix A (General Guide of Penalties for Delinquency or Misconduct), page A-4, offense #14.

4. After my verbal request to COL Huie for the statement of charges against me was made, COL Huie asked COL Nielsen for authority for the document to be given to me. This was granted and authority for same is given under AR 20-1 dated 15 Jun 78.

5. Attached hereto is certification of findings made in regards to charges intitiated against me in the IG investigation.

6. As to your request in para 2c of your letter, this letter concludes the "any and all statements, material or

further documentation" that I have for submission to you.

Incl as

LESLIE T. EVERETT, JR.
MAJ, AR, NCARNG
Commander, AASF #1

AG 11 March 1980

MEMORANDUM TO MAJOR LESLIE T. EVERETT, JR.

SUBJECT: Inspector General Investigation

At your request, this written memorandum confirms verbal exoneration of 28 November 1979 from all charges lodged against you by Major Elmer R. Barbee in recent Inspector General investigation.

WILLIAM E. INGRAM
Major General, NCARNG
Adjutant General

Letter by Elmer R. Barbee

Dated 26 March 1980

APPENDIX V

26 March 1980

SUBJECT: Request for Copy of Transcript; Inspector Generals Investigation Oct-Nov 1980

Inspector General
State Of North Carolina
Department of Crime Control and Public Safety
ATTN: COL Neilsen
P.O. Drawer 26268
Raleigh, North Carolina 27611

1. IAW Ci AR 20-1, Paragraph 1-12, e, dated January 1980, I am requesting a copy of the transcript of my testimony presented during the Inspector General's Investigation of October and November 1979. This was the investigation involving COL Bruce C. Guard, Major Leslie T. Everett Jr. and myself. Along with the transcript of testimony, I further request copies of all documents

pertaining to the investigation signed by me.

2. Please provide the requested information in person to me or mail it to me at P. O. Box B, Morrisville, North Carolina 27560. I appreciate your time and interest and if I can provide any further information, please contact me at 733-5069.

CF COL Beale

ELMER R. BARBEE
MAJ AR NCARNG
Aircraft Pilot Supervisor

Letter by I.G. Charles Nielsen

Dated 28 March 1980

APPENDIX VI

AGONG-IG 29 March 80

COL Earl B. Hule
Chief of Staff
North Carolina Army National Guard
Post Office Box 26268
Raleigh, North Carolina 27611

SUBJECT: MAJOR ELMER BARBEE
INVESTIGATION

1. The attached letter was hand-delivered to me on 26 March, 1980.

2. MAJ Barbee's request is in keeping with AR 20-1.

3. Photocopy the Form 1559 signed by MAJ Barbee and all pages of his testimony. MAJ Barbee's testimony was in two (2) parts.

4. Have MAJ Barbee come to your office and receipt delivery of the items noted in paragraph 4 above.

Charles R. Nielsen

COL, I.G.

State Inspector General

CF - MAJ Barbee

Sworn Testimony by

Col. Charles R. Nielsen

Civil Service Hearing

July 1980

APPENDIX VII

Mr. Twiggs wants to challenge the thoroughness of the investigation, he may do so. But it certainly should be accepted, if not for the truthfulness of everything in there, but to establish that a thorough investigation was in fact conducted by Colonel Neilsen.

You stated in your ruling yesterday that with respect to matters of opinion, the weight given to such opinions depended in part on the expertise of the person stating it. I suppose that expertise must in turn be based upon the person's reasonable opportunity to form an opinion. I say, therefore, that this investigation is offered to show that the opinions stated by the Inspector General are based on a thorough investigation of the charges.

HEARING EXAMINER COLEMAN: Let the record show that counsel for the

appellant objected to it being entered at this time. But we will go ahead and enter it based on counsel for the Agency's proposal.

(The documents referred to were marked as Exhibit 18 and received in evidence.)

HEARING EXAMINER COLEMAN: Are you ready to proceed?

CROSS EXAMINATION

BY MR. TWIGGS:

Q Colonel Nellsen, I don't believe they asked you where you reside. May I ask where you reside, sir?

A Kinston, North Carolina.

Q Your official duty with the National Guard in this position that you now hold is as the State Inspector General?

A That is correct.

Q You were called by General Ingram in this case to conduct an investigation as the Inspector General. Is that correct?

A To be specific, General Ingram told Colonel Huie to call me. But it amounts to the same thing. He directed that an investigation be done.

Q By you as the Inspector General in North Carolina?

A That is correct.

Q Now, in the beginning of your investigation, I would like to point to one of the exhibits that you referred, which is the exhibit that is dated October 24, 1979. Did you prepare this document for Major Barbee to sign?

A He did it in handwriting and then I had the stenographer type it and brought back to Major Barbee on the second recall and asked him to look at the

typed one. If it was agreeable, would he sign it? He did and it was signed.

Q And it was signed other than handwritten in this same form and on the same form back on the 24th and then was later resigned for record purposes.

A That is correct. It was just for record purposes. I think the reason why is my handwriting is not the clearest

Q Mine isn't either, Colonel. I sympathize with that. Sir, this is in evidence and it has been admitted in evidence as one of the exhibits. It is Exhibit BB. So it's before the body. This time, Mr. Smith has seen it.

This form is an Inspector General Action Request. That is the title of the form.

A That's correct.

Q Also, on the form, it says for use of this form see AR 20-1. Is that correct?

A That is correct.

Q Let me hand you AR 20-1 for identification purposes. AR 20-1, for identification purposes, is the Inspector General Activities and Procedures for Inspections and Investigations.

A That is correct.

Q The AR 20-1 also applies in 1.2, "This regulation applies to the Active Army, the United States Army Reserve and the Army National Guard.

A That is correct.

Q You were giving him this form to sign in respect to AR 20-1 as a member of the Army National Guard.

A That is correct.

Q The warning, if I can call it that, stated and printed on the bottom is "This information is submitted for the basic purposes of requesting assistance, correcting injustices affecting

individuals or eliminating conditions considered detrimental to the efficiency or reputation of the Army. I fully understand that I may be held accountable for any statements which are proved to be knowingly untruthful."

A That's correct. Mr. Twiggs, if I might state, the reason why this form was used was I felt I had to protect every person involved. This statement here was for the reasons for Everett and Guard as well as Barbee.

Q All right. And this statement, of course, protects Major Barbee from any information that he gives to you in your capacity as Inspector General, unless those statements are knowingly untrue. Is that correct.

A I do not know. "Knowingly"?

Q Isn't that what the form says?

A That's what the form says, yes.

Q I hand you now AR 20-1 also, Chapter 3 Section 34. I will ask you, sir, if you will, to read that into the record for me first.

A That is on page 3-2, paragraph 3-4, "Liability of Individuals Knowingly Making Untruthful Statements: Any person on duty with the Department of the Army who under the guise of presenting a legitimate complaint to the Inspector General knowingly makes an untruthful statement will be subject to disciplinary action. The appropriate commander will be informed promptly of the details of any such incident."

Q Colonel Neilsen, does it not appear to you that the form that Major Barbee signed concerning being "held accountable for any statements which are proved to be knowingly untruthful" was in effect taken from Section 3-4 of AR 20-1?

A Are you asking me if this is a synopsis of that paragraph?

Q Yes.

A It is, basically, yes.

Q I ask you now, if you will, to look at Section 3-3, refering back to Section 3-4, and if you will read Section E, which is on page 3-2 and is a portion of Section 33, please, into the record.

A Paragraph E: "Any type of disciplinary or other adverse actions against an individual for registering a complaint, except as provided for in paragraph 3-4, is prohibited."

Q All right, sir. That is your understanding of the protection given to an individual who signs a form DD 1559, which is Exhibit BB, which Major Barbee signed in this action. Is that correct?

A That is correct.

Q Do you have a copy of the transcript in front of you, sir?

A You have taken it away from me.

Q The transcript? Oh, I'm sorry; it's in evidence. When you said I had it, I thought you meant I had it.

A No, "you", the Court.

Q In connection with AR 20-1, Section 3.3 and the form Major Barbee signed, I ask you to turn please, if you will, to page 62. At the bottom of the page, in the last question, I will ask you if near the conclusion, being on the next to last page of your first interview with Major Barbee, if you did not in your capacity as Inspector General inform him, "I want to tell you again that the information that you have given to me is confidential. The exhibits you have given me will be part of the record. At the time that I have completed my investigation, I will report to General Ingram and I will tell him my conclusions and recommendations."

That is the statement, of course,. that you made to him.

A That's right and that is right out of the IG's record book. We have a format for the protection of the individual and all concerned.

Q And that is from 20-1?

A No, it's not. It is from the TBIG folder, Training Bulletin for the Inspector General. They have a format for questioning indiviuals and to make sure that the rights of the individuals are covered.

Q All right, if you will turn to the next page, please. The second sentence, "the information". This of course refers to the information that you obtained. "The information will be placed in a sealed file and will not be divulged to other people. The information that you have given me, I want to remain confidential." That is

also from your duties as Inspector General, not to make material given to you common knowledge.

A That's correct. The Inspector General's system is that he is the commander's agent. I am the agent of the Adjutant General. What I do is given to him for whatever he wants to do with it. He can throw it out the window or he can take severe action or he can take mediocre action and so forth.

Q That's true of all investigations. The Inspector General actually conducts for the -- Is that correct?

A It's for his commander.

Q All right, it's for his commander.

A We have other inspector generals who are at lower echelons.

Q All right, sir. Now, I will ask you please to look --if we handed it back to you. If we haven't I apologize. I don't think we have. I am handing

back to you the formal recommendation made and dated 12 November, 59. I think that is the one which has been admitted, the excised portion being excluded.

Concerning the evidence, you found that the testimony on page 2, number 6A, of Major Barbee did not prove the allegations as stated in 5A-1 and 2 against Guard and Everett.

A That is correct.

Q "Did not prove" were the words that you used in this respect.

A That is correct.

Q Under the portion remaining B on page 3 concerning Major Everett, your report states that "sworn testimony does not substantiate Barbee's accusations." "Does not substantiate" of couse is the language you used in that report.

A That is correct.

Q That was correct. Concerning discussion on page 4, number 7, refering

to dissatisfaction, "Major Barbee's primary reason for dissatisfaction and his allegations stem from his non-selection as facility commander and are further reinforced by his grounding by Major Everett. The allegations again cannot be proven, except for civilian work of Guard, but can be rationalized when taken in the context of a subordinate and a commander." You said there that these allegations simply could not be proven. Isn't that correct?

A That's correct.

Q Nowhere in your recommendations, turning please to page 6, did you use the word "false" concerning the information given to you by Major Barbee, did you, sir? If you will look at that, sir.

A Let me read the rest of the page.

(pause.)

No, I don't think I used the word "false" at all. I do not find it.

Q So your use of "false" when you described the information that Major Barbee gave you earlier, what you are referring to actually is that the allegations could not be proven and not that certainly Major Barbee was lying to you when he answered your questions?

A Now you are asking for my assumption now. Is that correct?

Q Well, I am asking --

A If you are, I would like to make some statements regarding that.

Q All right, I will ask you. I think you are entitled to do that.

A In the testimony, there are certain parts in here that I felt tended upon being false, but I could not prove it.

Q You could not prove they were false.

A I could not prove they were false. But other testimony led to it, but just didn't open the door to me. I am not a refined educated investigator. I am the Inspector General because of my experience in the National Guard and that is the way other Inspecotr Generals are.

Q Colonel, I think you did a good job in your investigation. I don't think you have to apologize for it frankly. And I think your questioning was excellent.

A Well, I feel like there were some points in there that should have been taken further.

Q All right. I can go through the testimony with you page by page, item for item, and I can ask you if you thought at the moment when he answered your question, if he was intentionally lying to you or stating untrue

statements. Now would you be able to answer any of those questions in that manner?

A No. I cannot find any untrue statements. In fact, I stated "in his mind".

Q Yes, "in his mind".

A I said that someplace in there.

Q Yes, I know you did.

Colonel, if you would turn to page 202. This was when you were of course asking him questions near the completion of the second interview with him. I think Mr. Smith referred to most of those questions, beginning about the middle of the page. You asked the question, "Did you ever make a statement to some of the personnel that it appears to you that if you were going out of the National Guard you are going to take some people with you?" He answered, "Yes sir, I did make that statement at

Letter by COL Wm. Keeton, Jr.

to the Honorable Charles O. Whitley

Dated 6 April 1981

APPENDIX VIII

AGONC-AGCS 6 April 1981

Honorable Charles O. Whitley
House of Representatives
Washington, D.C. 20515

Dear Mr. Whitley:

Reference is made to your letter, 31 March 1981, concerning a request made by Major Elmer R. Barbee for a copy of an uncensored report of the investigation of his case.

I have consulted our legal counsel in the Office of the State Attorney General, and he has confirmed that the request must be denied in accordance with existing Army Regulations and the Privacy Act.

Sincerely,

WILLIAM P. KEETON, JR.
Colonel, GS, NCARNG
Chief of Staff

Letter by U.S. Senator John East

With Attachment Dated

21 June 1982

APPENDIX IX

June 21, 1982

Mr. Elmer Barbee

Post Office Box 97

Manchester, Kentucky 40962

Dear Mr. Barbee:

I have received the enclosed letter from the National Guard Bureau in Washington, D.C. reguarding my inquiry on your behalf. I know how interested you are in this matter.

I trust the response is self explanatory and beneficial to your inquiry.

Please continue to keep me apprised of any concerns you have and do not hesitate to let me know whenever I may be of service.

Sincerely

John P. East

United States Senator

JPE:lb

Enclosure

NGB-PO 17 June 1982

Honorable John P. East
United States Senate
PO Box 25009
Raleigh, NC 27611

Dear Senator East:

This is in reply to your inquiry in behalf of Elmer R. Barbee who communicated with you recently requesting your assistance in obtaining an Inspector General's report from North Carolina.

The Office of the Inspector General, Headquarters, Department of the Army (DAIG-ZXF), Washington, D.C. 20310, is the releasing authority for Inspector General reports. Accoringly, Mr. Barbee should submit a written request to that office for a copy of the report he desires.

I hope this information will be helpful.

Sincerely,

Incl

JOHN D. STUCKLEY

CC: TAG NC

Chief, Office of Policy and Liason

Letter by Andrew Vanore, Jr.

Dated 24 August 1982

APPENDIX X

24 August 1982

Mr. Elmer R. Barbee

Post Office Box 97

Manchester, Kentucky

40962

Dear Mr. Barbee:

I reply to your letter of 9 August 1982 addressed to the Office of the Adjutant General of North Carolina, requesting copy of the original investigative report filed by the Inspector General. This Inspector General report was filed with the Adjutant General in 1979 and was based on certain complaints that you had initiated.

As you pointed out in your letter, you and your attorney were furnished with as much of the Inspector General's report which ethically and responsibly could be made available. For obvious reasons, Inspector General's reports contain information of a privileged nature, the

confidentiality of which must be maintained.

Mr. Barbee, you had your day in court. You were represented by most competent counsel. Although you did not concur with the results, you were provided every benefit allowable under law.

In my opinion, Army Regulation 20-1 prohibits the release of the entire Inspector General's report. As you are very much aware, when an Inspector General conducts an investigation, he speaks to many individuals on a very confidential basis and these individuals are, for obvious reasons, assured of the confidentiality of their comments. You and your attorney were afforded as much of the report as could ethically and legally be made available to you.

By copy of this letter, I am advising Senator East that I will be happy to personally discuss this matter,

including the Inspector General's report with him or any member of his staff.

Very truly yours,

RUFUS L. EDMINSTEN

Attorney General

Andrew A. Vanore, Jr.

Senior Deputy Attorney General

AAVjr:js

cc: Senator John P. East

General William E. Ingram

Col. William P. Keeton, Jr.

July 5, 1989

Assistance Division

Lieutenant Colonel Elmer R. Barbee
Post Office Box 130
Manchester, Kentucky 40962

Dear Colonel Barbee:

On the advice of the Department of Justice, while the matter of your allegations is in litigation, no further substantive response will be given by this office.

Sincerely,

Marcia Rinkel
Colonel, Inspector General
Chief, Assistance Division

Supreme Court, U.S.
FILED
AUG 18 1989
JOSEPH F. SPANIOL, JR.
CLERK

Case No. 88-1737

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

ELMER R. BARBEE

PETITIONER

VS

THE UNITED STATES

RESPONDENT

PETITIONER'S REPLY BRIEF TO THE UNITED STATES BRIEF IN OPPOSITION

Elmer R. Barbee

Attorney, Pro Se

Route 7, Box 345

Manchester, Kentucky 40962

(606) 598-3173 (H)

(606) 598-6151 (W)

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108 S. Ct. 688 (1988)

STATUTES

10 USC 3014

10 USC 3020

32 USC 709

SECRETARIAL REGULATIONS

Army Reg. 20-1 dtd 15 June 1978

Army Reg. 20-1 dtd 15 January 1980

Technician Personnel Reg. 752 dtd 23 February 1987

CONSTITUTIONAL PROVISIONS

ARTICLE I Section 8

ARTICLE III Section 2

TENTH AMENDMENT

FOURTEENTH AMENDMENT

ARGUMENTS

A. THE FACTS OF THIS CASE HAVE BEEN MISSTATED REPEATEDLY BY THE LOWER COURTS AND THE UNITED STATES.

Barbee was not removed because his first and second level supervisors refused to reissue his flight clearance. (Pet for Writ of Cert pg. 6-12) As presented by Barbee's supervisor, the reasons for his removal were his complaints as rendered to Col. Charles R. Nielsen, the Inspector General, that resulted in the October - November 1979 investigation conducted under Secretarial regulation, AR 20-1. (APPENDIX A) The reasons given in APPENDIX A are identical to those complaints listed on Barbee's Inspector General Action Request DA 1559. (Pet Supp Brief C-15). The Inspector General's Investigation did not conclude that Barbee made false statements, and Nielsen testified during Barbee's

hearing that he could find no false statement made by Barbee. (Pet. Supp Brief C46-49) In accordance with paragraph 3-4 of AR 20-1, June '78 or January '80, the Inspector General was the only authority who could state that false statements were made during his investigation; and he was responsible for notifying the commander immeadiately of any such incident.

The US Claims Court never considered these facts. (Pet for Writ of Cert. A1-A10) Even though Barbee's suit was filed almost two years prior to the Fausto decision, the US Claims Court used it as a basis for dismissal based on lack of jurisdiction. Barbee then used the Special Counsel's investigation and Complaint for Disciplinary Action against Barbee's first level supervisor, Major Leslie T. Everett, as the "appropriate authority" for a suit for

back pay to lie before the U.S. Court of Appeals. Barbee also corrected the facts and presented constitutional arguaments; however, the U.S. Court of Appeals chose not to address these and affirmed the lower courts decision. As shown, the Brief in Opposition, pages 2,3, and 4 are incorrect statements of fact in that they were derived from the incorrect facts of the U.S. Claims Court.

Barbee's initial defense of the 22 February 1980 Proposed Adverse Action was that the action was in violation of AR 20-1 dated 15 January 1980. Those violations were clearly and precisely pointed out to the Adjutant General. (APPENDIX II, III, IV) Irregardless of this, the Adjutant General, as the agency head, removed Barbee in violation of AR 20-1 (Pet for Writ of Cert. App D3-4).

B. THE OFFICE OF THE INSPECTOR GENERAL, BY LAW, IS THE APPROPRIATE AUTHORITY TO STATE THAT BARBEE SUFFERED AN UNWARRANTED PERSONNEL ACTION.

10 USC 3014 "Office of the Secretary of the Army" states in (b)(5) that:

> "(b)The Office of the Secretary of the Army is composed of the following-
> (5)The Inspector General of the Army"

10 USC 3014 (c)(1) states that:

> "The Office of the Secretary of the Army shall have sole responsibility within the Office of the Secretary and the Army Staff for the following functions:---
> (E) Inspector General"

10 USC 3014 (c)(2) states that:

> "...No office or other entity may be established or designated within the Army Staff to conduct any of the functions specified in paragraph (1)."

10 USC 3020 "Inspector General" states in paragraph e that:

> "(e)The Inspector General shall have such deputies and assistants as the Secretary of the Army may prescribe."

COL Rinkel is a deputy of the Inspector General appointed by the Secretary of the Army. The 7 March 1989

letter signed by COL Rinkel was given to Barbee based on evidence submitted by him, and reviewed by the Chief of Investigations Division, the Inspector General Legal Advisor, and the Chief of Assistance Division. (Pet for Writ of Cert. D 1-4) These persons, by law, are the "appropriate authority" to state that Barbee's removal was unwarranted based on Inspector General Regulations. By law, no one else in the Army has the authority to review or interpret Inspector General Regulations for the Secretary. Respondent's comments and footnotes contained in their Brief in Opposition at page 6 are therefore invalid. Respondent's Brief in Opposition APP 1a &2a was written based on recommendations by John S. Groat, Department of Justice; Major Cathy Cates, The Office of the Judge Advocate General; and National Guard legal

representatives. It was based on assumptions and on inapplicable portions of AR 20-1 in an attempt to provide a defense for the United States. (Pet Supp Brief 11-14)

In that Chapter 5 of AR 20-1, which pertained to inspections, not investigations, was utilized to state that Army Regulations did not apply to the National Guard; and in that page i of the June 1978 version of AR 20-1 stating that it was applicable to the National Guard was not considered, Respondants Brief in Opposition Appendix is invalid. (Pet Supp Brief 3-4)

The adverse action against Barbee was initiated on 22 February 1980, (Appendix A) therefore the 15 January 1980 version of AR 20-1 was in effect. All of those provisions and requirements cited in the 7 March 1989 letter from the Office of the Inspector General were

contained in the January 1980 version of AR 20-1 including the applicabilitiy paragraph 1-2. AR 20-1, paragraph 1-12 required coordination with the Office of the Inspector General prior to utilizing Inspector General records for adverse personnel actions such as "relief from duties." The Adjutant General did not comply with this requirement prior to initiating the adverse and prohibited action against Barbee.

In that the 7 March 1989 letter is correct, the Office of the Inspector General is the "appropriate authority" to state that the Adjutant General did violate Secretarial regulations and misused AR 20-1 in proposing Barbee's removal.

C. THE OFFICE OF THE SPECIAL COUNSEL CONCLUDED THAT BARBEE SUFFERED REPRISAL ACTION FOR EXERCISE OF APPEAL RIGHTS.

John P. Gidez, attorney for the Special Counsel, stated during arguments before the MSPB that:

> "James M. Coleman, the Hearing Examiner at Barbee's adverse action hearing, issued a decision in which he denied Barbee's appeal. Coleman noted that Nielsen did not find that Barbee had knowingly made false statements. Further, Coleman found that Barbee "established that there could well have been harassment on the part of Major Everett...evidenced by the six months time frame in getting him (Major Barbee) returned to flight status. "In addition, Coleman found that Barbee had presented evidence 'baring [SIC] out the fact that Major Everett demonstrated incompetence' and noted that Barbee's allegations of incompetence were supported, in part, by Everett's own admissions. In spite of these findings, Coleman concluded that Barbee 'did, in fact with foreknowleged of intent and consequence, knowingly make untruthful charges against Major Everett.' <u>This conclusion is illogical based on Coleman own findings</u>. Moreoever, Coleman's decision is at odds with Nielsen's sworn testimony that Barbee did not testify falsely during his investigation as well as with Barbee's own testimony in which he denied making untrue statements. Ingram, who had initially referred Barbee's allegations to the Inspector General for investigation, essentially adopted Coleman's

decision, thus compounding Coleman's error."
(Emphasis Added)

The OSC also cited Kennedy v. Department of the Army, Docket No. PH 07528110483 (MSPB July 17, 1984) as paralleling Barbee's case. Kennedy supra stated that:

"...[S]ince these statements were made in connection with and under a grievance, they were privileged statements which could not form the basis for the disciplinary action."

The Board noted that an employee "can support his position only through statements," that punitive action based upon such statements was impermissible and could not be sustained. (Kennedy, Supra, Slip op. at 6)

These arguments submitted by Gidez and the Complaint for Disciplinary Action by the OSC (Pet for Writ of Cert. App C) support those findings in the 7 March 1989 letter from the Office of the Inspector General.

D. WHEN AN ADJUTANT GENERAL VIOLATES PROCEDURES ESTABLISHED BY SECRETARIAL REGULATIONS, 32 USC 709 DOES NOT DEFINE HIM AS THE "APPROPRIATE AUTHORITY" AS PER FAUSTO, NOR DOES IT BAR JUDICIAL REVIEW.

> "(e)Notwithstanding any other provision of law and under regulations prescribed by the secretary concerned--"

This phrase establishes the ground rules and the requirements to be met by the adjutant general prior to him having the authority to administer any of those 6 paragraphs listed under (e). Petitioner has shown that two separate investigations were conducted, one of which was the only "appropriate authority" designated by law. Both investigations determined that there were no false statements or bases for an adverse action. Petitioner has also shown that the adverse action was prohibited by law, by Secretarial

regulation, and by the First and Tenth Amendments to the Constitution. The Adjutant General was outside of his jurisdiction. The decision made by the Adjutant General was based on an unwarranted and prohibited personnel action as defined in Secretarial Regulations.

32 USC 709 (e)(5) does not bar judicial appeal or review. Technician Personnel Regulation (TPR) 752, 23 February 1987, paragraph 2-19 C, (2) clearly states that the appeal referred to in 32 USC 709 (e)(5) is only an adminstrative appeal or review. This clearly leaves open judicial review; therefore the Claims Court improperly dismissed Petitioner's claim for back pay.

The Office of the Inspector General was established by Congress as "necessary and proper" to safeguard

those records and testimony of individuals making complaints of a federal nature which effect efficiency, discipline, and morale of the Department of the Army. If the state appointed Adjutant General is allowed to circumvent those procedures established by the Secretary of the Army through the Office of the Inspector General, the Adjutant General has in effect rendered that Government agency ineffective.

E. THE AGENCY ARBITRARILY AND CAPRICIOUSLY APPLIED SECRETARIAL REGULATIONS, THEREBY DENYING BARBEE DUE PROCESS ANDEQUAL PROTECTION UNDER THE LAW.

For years the National Guard applied both the June 1978 and January 1980 versions of AR 20-1, to protect the integrity of the Inspector General Investigation. (Pet Supp Brief. App C) According to the National Guard, this was done to protect the testimony of witnesses; however, Barbee's testimony

was released by the Adjutant General, in violation of paragraph 1-12 of AR 20-1, for purposes of a removal action. After nine years, the agency now states that AR 20-1 was inapplicable to Barbee's case. (Brief in Opp. App 1 and 2a) This is an arbitrary and capricious application of Secretarial regulations by the agency thereby denying Barbee equal protection under that regulation. (14th Amendment to the Constitution)

F. A COURT IS THE ONLY FORUM AVAILABLE TO CORRECT A PROHIBITED PERSONNEL ACTION TAKEN BY AN AJUTANT GENERAL AGAINST A TECHNICIAN.

Army Regulation 20-1 was violated by the agency and so stated by the "appropriate authority" by letter dated 7 March 1989. (Pet for Writ of Cert. App D) The Office of the Inspector General, by law, (10 USC 3014 & 3020) is the only Army agency that can make that determination.

In April 1985, James C. Hise, Chief, Office of Legal Advisor and Joseph R. Reyna, Chief, Labor Relations and Personnel, both of National Guard Bureau, argued before the MSPB that:

> "Of course the Bureau does not argue that 709 (e) forecloses judicial review of a final decision of an adjutant general. See Chaudoin v. Atkinson 494 F. 2d, 1323, 1328-9, n5 (3d Cir 1974) Rather 709 (e)(5) must read to foreclose further adminstrative appeals as in this case. New Jersey Air National Guard, 677 F, 2d at 280, n.3."

Therefore, no other adminstrative body can revoke a decision of an adjutant general. This leaves only a court of law to mandate corrective action of an unwarranted personnel action suffered by a National Guard technician.

CONCLUSIONS

A prohibited personnel action was committed by the agency against Barbee. The Inspector General's Office is the

"appropriate authority" as identified in Fausto to make that determination and has done so by letter dated 7 March 1989. The Special Counsel conducted a separate and independent investigation and arrived at the same conclusion as the Office of the Inspector General.

ARTICLE I, Section 8 of the Constitution provides for the Federal Government to govern such part of them (National Guardsmen Technicians) as may be employed in the service of the United States. ARTICLE III, Section 2 and the TENTH AMENDMENT to the constitution give the power to the Courts to adjudicate Barbee's Case. (Pet for Writ of Cert. 20-21) The proponderance of the evidence clearly shows that Barbee was the victim of a reprisal action for his complaints rendered to the Inspector General, and that Barbee's supervisor and the Adjutant General violated

Secretarial regulations in initiating and carrying out the adverse action against him. This was a violation of Barbee's appeal rights. Therefore, Barbee's Petition for Writ of Certiorari in this case should be granted.

Respectfully Submitted,

Elmer R. Barbee

Attorney, Pro Se

Route 7, Box 345

Manchester, Ky 40962

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 17th day of August 1989, I caused to be placed in the United States mail (first-class, postage prepaid) copies of "PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSTITION", addressed as follows:

Solicitor General
Department of Justice
Washington, D. C. 20530

17 August 1989

Elmer R. Barbee

Elmer R. Barbee
Attorney, Pro Se

AASF #1-RDU 22 February 1980

SUBJECT: Notice of Proposed Adverse Action (Removal)

Major Elmer R. Barbee
Aircraft Maintenance Officer
Army Aviation Support Facility #1
Morrisville, NC 27560

1. This is notice that I propose to remove you from your Full-Time employment with the North Carolina Army National Guard not earlier than Thirty calendar days from the date you receive this notice. The reason for this proposed action is that during ~~a recent~~ Inspector General investigation you made false, malicious, unfounded and highly irresponsible statements against me (your supervisor) with the express intent to destroy the reputation, authority, and official standing of me in my position as facility commander.

2. You, in a sworn statement (DA Form 3881 attached) accused me of personnal harrassment against you and job incompetence in my duties. In a thorough and impartial investigation involving sworn testimony by personnel who I assume you asked to testify in your behalf to substantiate the charges you made against me, it was determined the charges against me were totally unsubstantiated.

3. I consider your acts in this regard to be of the highest magnitude in your efforts to have me relieved of my job. The statement made by you to Major Owens to the effect that "it looked as if you were going and you were going to take Everett and Guard with you," leaves no doubt in my mind the intent behind the charges you initiated against me.

4. I regard your charges against me that resulted in the Inspector General

investigation to be a deliberate attempt to slander me, to bring discredit to me and my position, to embarrass me and a flagrant gross effort to undermine my position to the absolute maximum and to create the maximum dissension possible within the AASF #1 workforce.

5. You may review the material relied upon to support this action in the Technician Personnel Office, AGONC, Raleigh, NC. If you do not understand the reasons your removal is being proposed, contact COL Lon W. Taylor or Major Irvin R. Ellington in the Technician Personnel Office for further information. Advice and assistance may be obtained from these aforementioned individuals concerning the proposed action, and the regulations pertaining to it.

6. You may answer this notice personally, or in writing, or both

personnally and in writing to COL Beale, DCSOI and may submit affidavits in support of your answer. You will be allowed fifteen calendar days from the date of this notice to submit your answer. Consideration will be given to extending this period if you submit a request stating your reasons for desiring more time. Full consideration will be given to any answer you submit. No decision to effect the proposed action has been made or will be made until after the time allowed for your reply.

7. You will be allowed up to a maximum of 16 hours of official time to review the material relied on to support your reasons, to secure affidavits, and to prepare an answer to this notice. You should arrange with the undersigned for the use of official time.

8. As soon as possible after your answer is received, or after expiration of the 15 day limit if you do not answer, you will be given a notice of original decision.

9. During the notice period, you may request to work in normal technician status. However, if you fail to report to work or are not ready, willing and able to work, you will be carried as absent without leave. Requested and approved leave or leave without pay is also authorized during the notice period.

10. Duplicate copy provided for personal use.

Incl
as

LESLIE T. EVERETT JR.
MAJ AR NCARNG
Commander, AASF #1

7 April 1980

AIRCRAFT MAINTENANCE SHOP
NORTH CAROLINA ARMY NATIONAL GUARD
POST OFFICE BOX B
MORRISVILLE, NORTH CAROLINA 27560

SUBJECT: Appeal of Decision to Remove dated 31 March 1980

MAJOR GENERAL WILLIAM E. INGRAM
The Adjutant General of the State of North Carolina
Post Office Drawer 26268
Raleigh, North Carolina 27611

1. This appeal is submitted for your final adjudication on the decision to remove me from my employment effective 11 April 1980. Listed below are my reasons for contesting this adverse action.

a. MAJ Everett stated in the "Notice of Proposed Adverse Action,

(Removal), dated 22 February 1980, "the reason for this proposed action is that during a recent Inspection General investigation, you made false, malicious, unfounded, and highly irresponsible statements against me (your supervisor) with the express intent to destroy the reputation, authority, and official standing of me in my position as Facility Commander". No evidence was produced by MAJ Everett indicating that I made untrue statements during my testimony.

b. AR 20-1 prohibits any type of disciplinary or other adverse action against an individual for registering a complaint to the Inspector General unless that individual knowingly makes untruthful statements. I made no

untruthful statements, knowingly, during my testimony with the Inspector General. If the Inspector General had determined that I made untruthful statements, he was obligated to notify me immediately and then inform the appropriate commander promptly of the details of any such incident. This was not done during the investigation.

c. The decision to remove was based on two documents entered as evidence. One was a DA Form 3881, signed 25 October 1979 by MAJ Everett and COL Nielsen. This document was nothing more than a "Rights Waiver Certificate." It provided no information as to who levied the charges or that any untruthful statements were made. The other document provided was a

"Memorandum to MAJOR Leslie T. Everett, Jr." This document verbally exonerated MAJ Everett on 28 November 1979, but again does not indicate that untruthful statements were made by me.

2. In conjunction with the appeal submitted, I formally request a hearing before a fair, impartial, and objective hearing examiner from the current consolidated file of qualified examiners.

3. Again, I respectfully submit that my rights have been infringed upon by this proposed action. I respectfully submit to you that this removal proposal, and the decision to remove, were reprisal actions on the part of MAJOR Leslie T. Everett, Jr. based on the Inspector General's investigation. If it were a legitimate proposal, it would have been

processed in a much more expedient manner.

4. I would appreciate, very much, your timely handling of this request. Future correspondence for me should be sent to: MAJOR Elmer R. Barbee, Route 1 Box 20, New Hill, NC 27562. My home phone number is 919-362-4031. Again, I would appreciate your time and your expediant consideration to this matter.

ELMER R. BARBEE

MAJ AR NCARNG

October 30, 1980

Major General William E. Ingram
Adjutant General
State of North Carolina
P. O. Drawer 26268
Raleigh, North Carolina 27611

RE: MAJOR ELMER R. BARBEE

Dear General Ingram:

I appreciate the opportunity to both present this letter and the enclosures to you for consideration in Major Barbee's case and also to appear before you personally on his behalf.

Although I am sure it is part of your file, I would like to present a copy of the Memorandum in Support of the Findings of Fact, Conclusions of Law and Recommendations that I furnished to Colonel Coleman for his consideration. The important aspect of this case which affects all members of the National

Guard and transcends the individual plight of Major Barbee, is the right that members of the North Carolina Nationla Guard have to request aid in resolving problems related to the Army and cooperation with the Inspector General's report without fear of reprisal, providing the member does not "knowingly"make false statements. This is not only a right guaranteed to members of the National Guard by regulation but is also a right guaranteed to all citizens by the First Amendment to the United States Constitution.

In support of Major Barbee's contentions in the case, I refer you to Finding of Fact 8 by Colonel Coleman which reads as follows:

> "8. Through cross examination of witnesses, the appellant established that there could well have been harrassment on the part of Major Everett. As evidenced by the six months time frame in

> getting him (MAJ Barbee) returned to flight status. The alleged incompetency of MAJ Everett by the Appellant was supported by MAJ Everett's own admission that he (MAJ Everett) knew very little about aviation maintenance and the fact that he (MAJ Everett) confessed that COL Guard should handle Major Barbee's medical restriction because he (Guard) could get more done in his position. The appellant further presented testimony baring out the fact that MAJ Everett demonstrated incompetence by questioning NCO's about the TARS trip, rather than confronting MAJ Barbee, their Supervisor."

In this finding, Colonel Coleman acknowledges that Major Barbee established at the hearing that there "could well have been harrassment on the part of Major Everett." The finding further is critical of the manner in which Major Barbee's return to flight status was handled by Major Everett. Colonel Coleman further found that the "alleged incompetency of Major Everett" was supported by Major Everett's own admissions in that he knew very little

about aviation maintenance and again in his handling of the removal of the medical restriction which prevented Major Barbee from flight status. Colonel Coleman also found "demonstrated incompetency" by the manner in which Major Everett handled the questioning of the NCO's about the TARS trip. Each of these findings illustrates that the record now before you clearly establishes that Major Barbee had just grounds to complain to you and for you to order the IG investigation. By virtue of the fact that the IG investigation was ordered by you, the record before you further indicates that you believed this to be a manner which deserved the attention of the Inspector General.

At the hearing and on other occasions, Major Barbee had diligently attempted to re-establish a relationship

with Major Everett and has clearly stated that he can and will work under the supervision, authority, and command of Major Everett if given the opportunity to do so.

The record before you further indicates that Major Barbee is highly competent in the area of maintenance and that the morale and quality of maintenance in th North Carolina Air National Guard has suffered from his removal in this action.

For the best interest of the North Carolina National Guard and in order to rectify an individual wrong against Major Barbee which has been committed in this matter, I respectfully ask you to reconsider the position of the North Carolina National Guard and to reinstate Major Barbee to his former position.

With the best of personal regards, I remain

Yours very truly,

HFT/ram

Howard F. Twiggs

Enclosures

In the Matter of the Dismissal)
of MAJOR ELMER R. BARBEE)MEMORANDUM

One of the most important functions of the Inspector General is to "maintain a system through which service members or others may request aid in resolving problems related to the Army, without fear of reprisal or the unnecessary disclosure of information, and insures that appropriate action is taken in each case." (Emphasis added). (AR 20-1, Section 1-8(6), P. 1-5).

Pursuant to AR 20-1, Section 1-6, p. 1-4, the Inspector General is a confidential representative of the Secretary of the Army and the Chief of Staff and inquires into and reports upon matters affecting mission performance and the state of economy, efficiency, discipline, and morale of the Department of the Army.

Major Barbee requested the assistance of the Inspector General through the Adjutant General. At the direction of the Adjutant General, this confidential investigation was made.

At the conclusion of the investigation, it was the opinion of Colonel Charles R. Nielsen, Inspector General, that certain allegations were substantiated and others were not. It was the Inspector General's recommendation that Major Everett, Colonel Guard, and Major Barbee be talked to separately; that Colonel Guard be admonished for some of his actions and that Major Barbee receive counselling. It was his further recommendation that the case then be closed, all as set forth by the Inspector General's report to the Adjutant General dated 12 November 1979,

which is attached hereto and incorporated herein by reference.

After the report of the Inspector General, on 22 February 1980, Major Everett wrote Major Barbee notifying him that the adverse action had been instituted against Major Barbee and cited the Technician's Personnel Pamphlet 904, Appendix A, page a-4, Section 14, as Major Everett's authority for doing so. This section of the TPP 904 states the offense, the explanation of same, and the suggested penalties as follows:

1. The offense is "false, malicious, irresponsible statements against management officials, supervisors or other employees."

2. The explanation is "making false, malicious, unfounded or highly irresponsible statements or unauthorized disclosures against other employees, supervisors, or officials with the intent to destroy or damage the reputation, authority, or official standing of those concerned."

3. The suggested penalty for first

offense is written reprimand,. suspension, or removal.

Section 14 of the Technician's Personnel Pamphlet must be read and considered in context with the right of all military personnel to request aid in resolving problems related to the Army from the Inspector General <u>without fear of reprisal</u>, with clarity and in terms which ring from the Bill of Rights, AR 20-1, Section 3-3 at page 3-1, states that:

> "a. All military and civilian personnel on duty with the Department of the Army have the right to register complaints orally or in writing with an Inspector General" and
>
> "e. Any type of disciplinary or other adverse action against an individual for registering a complaint, except as provided for in paragraph 3-4 is prohibited."

AR 20-1, Section 3-13 at Page 3-5 further provides:

> "Department of the Army personnel are prohibited from restricting in any manner any

> individual from registering a complaint or cooperating with an Inspector General. Moreover, once an individual has submitted a complaint or cooperated with an Inspector General, Department of the Army personnel are prohibited from initiating any type of disciplinary, adverse or other action against that individual solely because of the complaint or cooperation rendered the Inspector General."

The only exception is described in Paragraph 3-4, which provides that:

> " Any person on duty with the Department of the Army who, under the guise of presenting a legitimate complaint to an Inspecotr General, knowingly makes untruthful statements will be subject to disciplinary action. The appropriate commander will be informed promptly of the details of any such incident."

The evidence here has clearly failed to show that Major Barbee knowingly made untruthful statements. The Inspector General did not find that Major Barbee had "knowingly" made false statements. No disciplinary action was recommended by the Inspector General against Major Barbee. From the Inspector General's

own recommendation, it appears that Major Barbee believed the statements which he made during the course of the investigation (even though not all the allegations so made were proven), as evidenced at the conclusion of his report to the Adjutant General.

Military personnel must be free to seek the assistance of the Inspector General. They must then be allowed to communicate freely to the Inspector General. We ask only that Major Barbee be afforded these guaranteed rights. He did <u>not</u> "knowingly" make false statements.

To permit the dismissal of Major Barbee, a highly motivated career National Guard employee, on the basis of statements which he made in good faith during an Inspector General investigation would be a travesty of

justice and should clearly not be condoned.

Respectfully submitted,

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Howard F. Twiggs

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Elmer R. Barbee